# TRANSCRIPT OF [illegible]

## SUPREME COURT OF THE UNITED [illegible]

OCTOBER TERM, [illegible]

## No. 141.

WINFIELD S. GREGG, PETITIONER,

*vs.*

THE METROPOLITAN TRUST COMPANY [illegible]

ON WRIT OF CERTIORARI TO THE UNITED STATES [illegible]
OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED NOV[illegible]

CERTIORARI AND RETURN FILED DEC[illegible]

(19,133.)

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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | *a* | 1 |
| Transcript from the circuit court of the United States for the southern district of Ohio | 1 | 1 |
| Caption | 1 | 1 |
| Bill of complaint | 2 | 2 |
| Copy trust deed to Mercantile Trust Co. | 8 | 8 |
| Order appointing receiver | 24 | 22 |
| Application of receiver for leave to borrow $200,000 | 27 | 25 |
| Order granting receiver permission to borrow $200,000 | 30 | 27 |
| Service of notice waived | 31 | 28 |
| Supplemental petition of receiver | 32 | 29 |
| Order on supplemental petition | 35 | 32 |
| Order granting Winfield S. Gregg leave to file intervening petition | 37 | 34 |
| Intervening petition of Winfield S. Gregg | 38 | 34 |
| Exhibit A—Bill of Gregg, June 3, 1897 | 45 | 41 |
| B—Certificate of auditor of filing claim | 45 | 41 |
| C—Promissory note to Gregg, May 12, 1897 | 45 | 41 |
| D—Promissory note to Gregg, May 12, 1897 | 46 | 42 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 8, 1904.

| | Original. | Print |
|---|---|---|
| Exhibit E—Promissory note to Gregg, May 25, 1897 | 46 | 42 |
| F—Promissory note to Gregg, May 25, 1897 | 47 | 43 |
| G—Promissory note to Gregg, May 25, 1897 | 47 | 43 |
| H—Promissory note to Gregg, May 25, 1897 | 47 | 43 |
| I—Promissory note to Gregg, May 25, 1897 | 48 | 44 |
| Receipt of notice by Alexander & Green | 49 | 44 |
| Receipt of notice by C. S. & H. R. R. Co. | 49 | 45 |
| Dependent and ancillary bill of complaint of Metropolitan Trust Co. | 50 | 45 |
| Exhibit "A"—General mortgage | 67 | 62 |
| Order granting Winfield S. Gregg leave to file amendment to intervening petition | 88 | 81 |
| Amendment to intervening petition of Winfield S. Gregg | 89 | 81 |
| Order on intervening petition of Winfield S. Gregg | 90 | 83 |
| Order for consolidation of causes | 92 | 84 |
| Order on intervening petition | 93 | 85 |
| Answer of Mercantile Trust Co. to petition of Winfield S. Gregg. | 96 | 88 |
| Demurrer of Felton, receiver | 97 | 89 |
| Order of reference to H. M. Butler, master | 98 | 90 |
| Order granting Metropolitan Trust Co. leave to amend bill | 99 | 91 |
| Amendments to bill of Metropolitan Trust Co | 100 | 91 |
| Order modifying order of February 20, 1899 | 107 | 98 |
| Deposition of W. H. Mantz | 108 | 98 |
| Second amendment to paragraph 17 of the bill of complaint of Metropolitan Trust Co. | 120 | 110 |
| Order of reference | 123 | 112 |
| Amendment of bill of complaint of Metropolitan Trust Co. so as to make it responsive to the answer of Sinks, trustee | 125 | 115 |
| Proof of claim | 129 | 118 |
| Affidavit of Winfield S. Gregg | 129 | 118 |
| Exhibit A—Statement of account | 132 | 121 |
| B—Note to Gregg, May 12, 1897 | 132 | 121 |
| C—Note to Gregg, May 12, 1897 | 132 | 122 |
| D—Note to Gregg, May 25, 1897 | 133 | 122 |
| E—Note to Gregg, May 25, 1897 | 133 | 122 |
| F—Note to Gregg, May 25, 1897 | 133 | 123 |
| G—Note to Gregg, May 25, 1897 | 134 | 123 |
| H—Note to Gregg, May 25, 1897 | 134 | 123 |
| Further proof of claim | 134 | 124 |
| Account and affidavit of Gregg | 134 | 124 |
| Affidavit of F. J. Picard in support of claims of the Zanesville Terminal Railway Co. *et al* | 136 | 125 |
| Report and affidavit of E. M. Fisher, auditor, as to the books of C., S. & H. R. R. Co. | 138 | 127 |
| Statement of E. M. Fisher, showing payments made upon car trusts | 140 | 128 |
| Special master's report, H. M. Butler, special master | 141 | 130 |
| Exceptions of Winfield S. Gregg to special master's report | 152 | 140 |
| Order as to exceptions | 153 | 141 |
| Further amendments to bill of complaint of Metropolitan Trust Co. | 154 | 142 |

| | Original. | Print |
|---|---|---|
| Order substituting Joseph Robinson, receiver, as party defendant to intervening petition of Winfield S. Gregg | 157 | 144 |
| Stipulation upon the intervening petition of Winfield S. Gregg. | 157 | 145 |
| Articles of agreement between Winfield S. Gregg and C., S. & H. Ry. Co. | 161 | 148 |
| Final decree of March 10, 1900 | 164 | 151 |
| Petition for appeal by Winfield S. Gregg, April 19, 1900 | 197 | 182 |
| Assignment of errors, April 10, 1900 | 198 | 183 |
| Order allowing appeal, May 21, 1900 | 201 | 186 |
| Appeal bond and waivers of citation | 202 | 186 |
| Mandate of United States circuit court of appeals, January 19, 1901 | 210 | 194 |
| Decree, November 25, 1901, on mandate of United States circuit court of appeals, sixth circuit | 213 | 196 |
| Master's report, filed February 20, 1902 | 253 | 234 |
| Evidence before the master | 277 | 257 |
| McGowan Exhibit 1—Payments for old debts, &c. | 277 | 258 |
| 2—Payments for car trust notes, &c. | 278 | 258 |
| 3—Payments for permanent improvements, &c. | 279 | 259 |
| 4—Payments for interest on bonds, &c. | 279 | 259 |
| 5—Recapitulation | 280 | 261 |
| 6—Money acquired by loans, &c. | 281 | 261 |
| 7—Earnings, operating expenses, &c. | 282 | 263 |
| 6*a*—Money acquired by loans, &c. | 284 | 265 |
| 7*a*—Sundry operating expenses unpaid | 284 | 265 |
| 1 B—Receipts from railway company and receiver, &c. | 284 | 266 |
| 1 A—Payments for old debts, &c. | 285 | 267 |
| Exhibit 3 A—Payments for permanent improvements, &c. | 287 | 268 |
| Testimony of William McGowan | 289 | 270 |
| Merion's Exhibit A—Receipts from sources other than earnings, &c. | 297 | 278 |
| B—Money acquired by loans, &c. | 297 | 279 |
| C—Union Depot viaduct account | 302 | 284 |
| Testimony of James E. Merion | 303 | 285 |
| Affidavit of Cassius C. Conner | 312 | 293 |
| Exhibit A—Agreement between Union Depot Co. and Columbus, Sandusky and Hocking Ry. Co., April 12, 1893. | 314 | 295 |
| B—Agreement between Union Depot Co. and Sandusky and Columbus Short Line Railway Co., April 12, 1893 | 325 | 305 |
| Exceptions of Winfield S. Gregg to report of special master, filed February 20, 1902 | 336 | 315 |
| Ruling of Judge Thompson | 338 | 317 |
| Decree of October 8, 1902, on exceptions to report of H. M. Butler, special master | 339 | 318 |
| Decree of confirmation and distribution, October 8, 1902 | 344 | 323 |
| Stipulation as to appeal, &c. | 356 | 334 |
| Petition of Winfield S. Gregg for appeal, October 25, 1902 | 358 | 335 |
| Assignment of errors of same, October 25, 1902 | 359 | 336 |

| | Original. | Print |
|---|---|---|
| Appeal bond | 362 | 339 |
| Order allowing appeal | 364 | 341 |
| Clerk's certificate to transcript on appeal | 365 | 342 |
| Waivers of citation | 365 | 343 |
| Appearance for appellant | 367 | 344 |
| Order for continuance | 368 | 344 |
| Order submitting cause and granting writ of certiorari | 368 | 344 |
| Memorandum brief for appellant | 369 | 345 |
| Stipulation as to record, &c. | 370 | 345 |
| Decree | 374 | 347 |
| Opinion | 376 | 347 |
| Petition for rehearing | 387 | 355 |
| Order denying petition for rehearing and amending opinion | 394 | 359 |
| Clerk's certificate | 395 | 359 |
| Writ of certiorari | 396 | 359 |
| Return to writ of certiorari | 397 | 360 |

a United States Circuit Court of Appeals, Sixth Circuit.

WINFIELD S. GREGG, *Appellant*,
*vs.*
METROPOLITAN TRUST CO., MERCANTILE TRUST CO., JOSEPH ROBINSON Receiver of the Columbus, Sandusky & Hocking Railroad Co., et al., *Appellees*. } No. 1162.

Appeal from the circuit court of the United States for the Southern District of Ohio.

*Record.*

Original transcript filed October 31, 1902.

Filed January 23, 1903, FRANK O. LOVELAND, *Clerk*.

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division*, } *ss:*

At a stated term of the circuit court of the United States of America, within and for the Eastern Division of the Southern District of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court rooms at the city of Columbus, Ohio, in said district, on the first Tuesday of June, being also the third day of that month, in the year of our Lord one thousand nine hundred and two, and of the American Independence the one hundred and twenty-sixth.

Present: The Honorable Albert C. Thompson, District Judge.

Among the proceedings had were the following, to wit:

THE MERCANTILE TRUST COMPANY, TRUSTEE, *Complainant*,
*against*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, *Defendant*. } In Equity. No. 816.

Be it remembered, that heretofore, to wit, on the 2d day of June, in the year of our Lord one thousand eight hundred and ninety-seven, came the complainant herein by its solicitors, and filed in the clerk's office of the court aforesaid, its certain bill of complaint against the defendant herein, which said bill of complaint is clothed in the words and figures following, to wit:

2 *Bill of Complaint.*

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE, *Complainant*,
*against*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, *Defendant*.
} In Equity.

To the honorable judges of the circuit court of the United States for the southern district of Ohio in the sixth circuit:

The Mercantile Trust Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of said State, as trustee under the hereinafter recited mortgage dated November 9, 1895, made and executed by the Columbus, Sandusky and Hocking Railroad Company, brings this, its bill of complaint, against the Columbus, Sandusky and Hocking Railroad Company, a corporation organized and existing under the laws of the State of Ohio, and and thereupon your orator complains and says as follows:

First. Your orator is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is a citizen and resident of said State within the meaning of the laws fixing and determining the jurisdiction of this Honorable Court.

Second. That the defendant, The Columbus, Sandusky and Hocking Railroad Company is a corporation created by and existing under and by virtue of the laws of the State of Ohio, and is a resident and citizen of said State within the meaning of the laws fixing and determining the jurisdiction of this Honorable Court, and is authorized to construct, maintain and operate, and now owns and operates a line of railroad from the city of Sandusky to, at or near the city of Marietta, in and through the counties of Erie, Huron, Sandusky, Seneca, Crawford, Marion, Delaware, Franklin, Fairfield, Perry, Muskingum, Morgan, Hocking, Athens and Washington, with termini in the city of Sandusky, Erie county, and at or near the city of Marietta, Washington county, all in the State of Ohio.

3 Third. That on or about the 9th day of November, 1895, the said Columbus, Sandusky and Hocking Railroad Company, being a body politic and corporate owning, possessing and operating said railroad aforesaid, being the property described in the mortgage hereinafter mentioned, exercising the

rights and franchises mentioned in said mortgage by its officers duly authorized thereto, and under its corporate seal duly made and executed its bonds to an amount not exceeding in the aggregate two million dollars, dated on that day, and payable in gold coin lawful money of the United States of America of the present standard of weight and fineness, at its agency in the city of New York, on the 1st day of October, A. D. 1900, and for the payment on presentation and surrender of the coupons annexed to said bonds as they should severally become due, of the interest on said bonds at the rate of five per cent. per annum, such interest being payable in like coin at said agency on the 1st days of April and October of each and every year until the said principal sum should be paid, said bonds and coupons being substantially in the form shown in the mortgage hereinafter referred to.

Fourth. That to secure the payment of the principal and interest of the said bonds the said defendant The Columbus, Sandusky and Hocking Railroad Company on or about the 9th day of November, 1895, duly authorized thereto by the directors and stockholders of the said railway company, made, executed and delivered to your orator as trustee its certain mortgage or deed of trust dated on that day, a copy of which is hereto annexed, marked "Exhibit A," and made a part hereof, and thereby conveyed to your orator as trustee its lawful successor or successors in said trust all the property of the Columbus, Sandusky and Hocking Railroad Company, both real, personal and mixed, including its franchises, privileges, resources, interests, road equipment, machinery, telegraph lines, income, tolls, rents, leases, appendages and appurtenances then owned or in any manner whatsoever acquired, and especially the line of railway formerly owned by Columbus, Sandusky and Hocking Railway Company and conveyed to said Columbus, Sandusky and Hocking Railroad Company by Messrs. D. B. Hatch and George W. Sinks by deed dated November 4th, A. D. 1895, together with its lands, tenements and hereditaments, rights of way, fixtures, buildings, bridges, piers, docks, wharves, fences, structures, railways, locomotives, tenders, cars, carriages, equipment, machinery, tools, implements, materials, chattels, fran-
4 chises, privileges, rights, interests, telegraph lines, rents, tolls, incomes, revenues, resources, reservations, benefits, investments, leases, contracts, assets and estate, legal and equitable, then owned or thereafter to be acquired by said company or in any way belonging or appertaining to its said railroad; said property and estate so conveyed, together with all and singular the reservations, remainders, issues, privileges and appurtenances then or thereafter belonging or in any wise appertaining thereto to be held unto your orator, its successor and

assigns forever, in trust, nevertheless, for the persons and corporations and for the benefit, security and protection of the persons and corporations who shall be or become the owners and holders of or lawfullly entitled to demand and receive payment of the said bonds and said warrants attached thereto, equally, pro rata, without preference or priority to one over another and upon and for the trusts, uses and purposes and subject to the conditions and provisions therein expressed and declared.

Fifth. That your orator, the said trustee, duly accepted the trust created by said mortgage or deed of trust, and united in the execution of the same, to evidence such acceptance.

Sixth. That said mortgage or deed of trust was forthwith thereafter duly recorded in each of the counties in which was situated any part of said mortgaged property.

Seventh. That all the said authorized issue of bonds for the principal sum in the aggregate of two million dollars were thereafter duly certified by your orator and delivered to the said railroad company in accordance with the provisions of the said mortgage or deed of trust, and as your orator is informed and verily believes about $700,000, par value thereof are now outstanding, held and owned by various parties, and that the balance of said issue, about $1,900,000 par value, are held as security for claims against said railroad company or its property.

Eighth. That your orator is informed and believes, and therefore alleges, that on the first day of April, 1897, there became due and payable upon said bonds issued and outstanding as aforesaid, a semi-annual installment of interest evidenced by interest warrants or coupons attached to said bonds due on the last mentioned date, amounting to $50,000; and that no portion of said interest has been paid, and that a large number of the said interest warrants or coupons due or payable on that day have been presented at the agency of said defendant rail-
5 way company in the City of New York, that being the place where, by their terms, said coupons were payable, and payment thereof has been demanded and refused, and that said defendant railroad company has in this respect made default and said default continues, and that said defendant railroad company has failed to pay the interest on said bonds according to the stipulations thereof and of the said interest warrants or coupons, and of the conditions and convenants of the said mortgage or deed of trust, and is in default in respect of said stipulations, conditions and covenants.

Ninth. And your orator further says that since the default aforesaid the holders of a large number of said bonds, to wit, more than a majority thereof now outstanding, have by requisition in writing and signed by them, requested your orator to

proceed forthwith to enforce the rights of the bondholders under said mortgage or deed of trust by such proceeding as your orator shall deem most expedient, and for the interest of the bondholders secured thereby.

Tenth. And your orator further says on information and belief that the defendant railroad company owes a large amount of money to its employes for services rendered and for pay-rolls, and is indebted for necessary supplies, for rolling stock and for other expenses necessarily incurred in the operation of said railway; that taxes have accrued and are in arrears, and that proceedings are liable to be taken, and decrees and judgments entered for claims against the railroad company, and the operation of the company thereby become embarrassed, its earnings diminished and the security of the bondholders represented by your orator greatly impaired.

Eleventh. And your orator alleges that the railway property and premises embraced in and secured by said mortgage or deed of trust November 9th, 1895, are inadequate security for the bonds issued thereunder, and that said defendant, the Columbus, Sandusky & Hocking Railroad Company, is insolvent, and that, in order to protect the rights of your orator and said bondholders, and preserve the property covered by your orator's said mortgage and the revenues thereof, which, as your orator alleges, form an essential element of your orator's security, so that the interest of the holders of the bonds secured by said mortgage may be preserved, a receiver or receivers should be appointed forthwith of the property, rights and franchises covered by your orator's said mortgage, with such rights, powers and privileges as is usually accorded to receivers in similar causes.

6 Twelfth. And your orator further alleges that prior to the commencement of this action no proceedings at law or in equity for the recovery of said indebtedness secured by said mortgage or any part thereof have been had or taken, so far as your orator has knowledge.

Thirteenth. And your orator further alleges that the matter in controversy herein exceeds the sum of $5,000, exclusive of interests and costs.

Fourteenth. And your orator further shows that the property, rights and franchises covered by said mortgage or deed of trust are now used and operated as an entirety and can not be severed without very material diminution of the value thereof, and without injury to the bondholders represented by your orator and others interested in said railroad and ought to be sold as an entirety.

Wherefore, and forasmuch as your orator is remediless in the premises under and by the strict rules of the common law

and can have relief only in a court of equity where matters of this nature are properly cognizable and relievable, your orator prays that the said mortgage may be decreed to be a lien upon all the property mentioned and described therein and upon all the property real, personal and mixed, rights, franchises, lands, titles, railroad branches, extensions, tolls, incomes, rents, issues and profits of the said railroad company secured by said mortgage, and that said railroad company may be decreed to pay unto your orator for, the holders for the bonds described by said mortgage, to your orator, whatever may be due for interest on the bonds secured by the aforesaid mortgage, together with all the costs and expenses in this behalf incurred and expended, and in default thereof that the defendant railroad company above named, and all persons claiming under it, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to all the property, rights and franchises covered by said mortgage, and every part and parcel thereof; and that all and singular the said mortgaged property, with the appurtenances, property and effects, rights, immunities and franchises in said mortgages mentioned, may be sold under a decree of this honorable court; that an account may be taken of the bonds secured by said mortgage and of the amount due on said bonds for interest; and that the trustee, after paying all reasonable costs, charges and expenses incurred by it in the execution of its trust, including taxes, counsel and attorney's fees, and indemnifying itself from all liability in the premises, shall apply so much of the proceeds of said sale as may be necessary to the payment of the interest then unpaid on the bonds then outstanding, ratably to the holders thereof, without discrimination or preference, and shall pay over any surplus to the railroad company or to whomsoever shall be entitled to receive the same; that during the pendency of this suit a receiver or receivers may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases, of all the property, equitable interests, things in action, effects, moneys, receipts, earnings, rights, privileges, franchises and immunities of the said railroad company and its tolls, incomes, rents and issues, and of all other property included in and covered by said mortgage, within the jurisdiction of this honorable court; and that the said defendant railroad company, and all other persons having possession thereof, may be decreed to make such transfer or conveyance to such receiver or receivers when appointed and to the purchaser of said property at any sale which may hereafter be decreed to be made herein, as may be necessary and proper to put them or any of them in possession and con-

trol of said property; that a writ of injunction issue out of and under the seal of this honorable court directing, commanding, enjoining and restraining the said defendant railroad company and its officers, directors and agents and all other persons whomsoever, from interfering with, transferring, selling and disposing of any property of the defendant, or from taking possession of, levying upon or attempting to sell by judicial process or otherwise, any portion of the property of said defendant railroad company, and that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require, and to this honorable court shall seem meet. That your honors grant unto your orator a subpoena of the United States of America, issuing out of and under the seal of this honorable court directed to The Columbus, Sandusky and Hocking Railroad Company, defendant herein, and thereby commanding it on a day certain to be therein named, and, under a certain penalty, to be and appear before this honorable court, then and there to answer (but not under oath, such oath being hereby expressly waived, all and singular the premises, and to stand to and perform and abide by such order, direction and decree as may be made against it in the premises, as shall seem meet and agreeable to equity and good conscience. And that
8 your orator may have such other or further relief, or both, as to your honors shall seem just and equitable.

And your orator, as in duty bound, will ever pray, &c.

[SEAL.] THE MERCANTILE TRUST COMPANY,
By H. C. DEMING, *Vice-President.*
ALEXANDER & GREEN, *Solicitors.*

Attest:
E. R. ADEE, *Secretary.*
CHARLES C. DEMING,
*Of Counsel.*
LAWRENCE MAXWELL, JR.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

Henry C. Deming, being duly sworn, says: That he is vice-president of The Mercantile Trust Company, the complainant in the foregoing bill; that he has read the same and knows the contents thereof, and that the allegations therein contained, so far as they relate to his own acts, are true; and so far as they relate to the acts of others he believes them to be true; and in regard to all matters in the foregoing bill of complaint alleged, which are not within the personal knowledge of this deponent,

deponent has been duly informed, and he believes that the same are true.

H. C. DEMING.

Sworn to before me, this 29th day of May, 1897.

[SEAL.] R. DAMM,

*Notary Public, Kings County, N. Y.*

Certificate filed in New York County.

First Mortgage From The Columbus, Sandusky & Hocking Railroad Company to The Mercantile Trust Company.

This indenture, made this, the ninth day of November, A. D. 1895, between The Columbus, Sandusky and Hocking Railroad Company, a corporation duly organized under the laws of the State of Ohio, party of the first part, hereinafter
9 referred to as the "Railroad Company;" and The Mercantile Trust Company, a corporation duly organized under the laws of the State of New York, party of the second part, hereinafter referred to as the "Trustee."

Witnesseth:

Whereas, said Railroad Company, party of the first part, in pursuance of the power conferred upon it by the laws of the State of Ohio, is owner of and engaged in operating a line of railroad from the City of Sandusky to, at, or near the City of Marietta, in and through the counties of Erie, Huron, Sandusky, Seneca, Crawford, Marion, Delaware, Franklin, Fairfield, Perry, Muskingum, Morgan, Hocking, Athens and Washington, with its termini in the City of Sandusky, Erie county, and at or near the City of Marietta, Washington county, all in the State of Ohio; and

Whereas, in pursuance of a call duly made as by law required, the stockholders of The Columbus, Sandusky and Hocking Railroad Company met at the general offices of said company, in the City of Columbus, Ohio, on the fifth day of November, A. D. 1895, at 10 o'clock a. m. All the stockholders of said railroad company being present in person or by proxy at said meeting, they did unanimously pass and adopt the following resolution, to wit:

"Resolved, That the board of directors of The Columbus, Sandusky and Hocking Railroad Company, for the purpose of building, constructing and equipping its said road, and for the purpose of securing money needed in its business, and for any and all other purposes, as may be required, and as are provided for by the laws of the State of Ohio, be and they are hereby authorized to issue a series of first mortgage coupon

bonds of The Columbus, Sandusky and Hocking Railroad Company, amounting in the aggregate to two million dollars ($2,000,000.00), bearing interest at the rate of five per centum (5 per centum) per annum, interest payable semi-annually on the first days of April and October of each year, at the agency of the company in the City of New York, both interest and principal payable in gold coin of the United States of the present standard of weight and fineness; said bonds to be issued in one series to the amount of two million dollars ($2,000,000.00), numbered consecutively from one (1) to two thousand (2,000), both inclusive, each of said bonds being for the sum of one thousand dollars ($1,000), and having interest warrants attached for the payment of the interest aforesaid; said interest warrants to be duly authenticated by the engraved signature of the secretary of this company, and the principal of the bonds being payable five (5) years from the first day of October, A. D. 1895, and to secure the payment of the principal and interest of said bonds by a first mortgage in the nature of a conveyance or a deed of trust, to be signed by the president of this company, under its corporate seal, and attested by its secretary, and duly acknowledged and delivered by the president of this company, under its corporate seal, and attested by its secretary, and duly acknowledged and delivered by the president, in the name and on behalf of this company, to The Mercantile Trust Company, as trustee; conveying to it in trust for the purposes aforesaid, all the property of The Columbus, Sandusky and Hocking Railroad Company, both real, personal and mixed, including its franchises, privileges, resources, interests, road, equipment, machinery, telegraph lines, income, tolls, rents, leases, appendages, and appurtenances now owned, or in any manner whatsoever hereafter acquired, and with all such other and further provisions as are usual in like instruments, and as the president shall approve by executing, and especially including the line of railway formerly owned by The Columbus, Sandusky and Hocking Railway Company and conveyed to this company by Messrs. D. B. Hatch and George W. Sinks, by deed dated November 4, A. D. 1895.

"Said mortgage or deed of trust to be under date of November 9, A. D. 1895.

"Provided that, the bonds to be issued shall on their face especially release any and all stockholders of this company from any and all liabilities on account of the payment of the principal and interest of said bonds or any part thereof."

And whereas, at a meeting of the board of directors of The Columbus, Sandusky and Hocking Railroad Company, held at the general offices of said company, in the city of Columbus,

Ohio, on the fifth day of November, A. D. 1895, said meeting having been duly called and held, they did thereat unanimously adopt and pass the following, to wit:

"Whereas, The Columbus, Sandusky and Hocking Railroad Company, in pursuance of the powers conferred upon it by the laws of the State of Ohio, and pursuant to a resolution heretofore, on the fifth day of November, A. D. 1895, unanimously adopted by all the stockholders of this company, at a meeting of said stockholders, duly called and held as by law required, and at which meeting all the stockholders of this company were present in person or by proxy, said stockholders did, by unanimous vote authorize the board of directors of this company to cause to be issued a series of first mortgage
11 bonds aggregating two million dollars ($2,000,000.00) and to secure the same by a first mortgage upon all the property, rights and franchises of this company, now owned or hereafter to be acquired, in the manner ond form as required by the laws of the State of Ohio, therefore,

"Resolved, First, That for the purpose of raising money needed in its business and for any and all other purposes for which by law it may be authorized and which may be expedient in the management of its property and in the carrying on of its business, it is necessary and expedient that the Columbus, Sandusky and Hocking Railroad Company borrow upon the credit of the corporation, its assets, and property of every kind and character, now owned or hereafter to be by it acquired, the sum of two million dollars ($2,000,000.00).

"Second, That in order to effect such loan, there be prepared for issue and negotiation, two thousand (2,000) bonds of this company, to be signed by its president and secretary and duly authenticated by the trustee, named in the mortgage or deed of trust, given for their security, each of said bonds to be for the sum of one thousand dollars ($1,000.00), bearing date of Nov. 9, 1895, and payable five (5) years from October 1, 1895, to the holder thereof, with interest at the rate of five per centum (5 per centum) per annum, from November 1, 1895, interest payable semi-annually on the first days of April and October of each year, at the agency of said company in the city of New York, both principal and interest to be payable in gold coin of the United States of the present standard of weight and fineness, and such bonds to be issued in one series to the amount of two million dollars ($2,000,000.00), numbered consecutively from one (1) to two thousand (2,000), both inclusive, each of said bonds to have interest warrants attached for the payment of the semi-annual interest as aforesaid, and said interest warrants to be duly authenticated by the engraved signature of the secretary of the company.

"Third. That to secure the payment of the principal and interest of said bonds, there be executed, under date of November 9th, 1895, a first mortgage in the nature of a conveyance or a deed of trust, to be executed and signed by the president of this company, under its corporate name and seal, and attested by its secretary and duly acknowleded and delivered by the president in the name and on behalf of this company to The Mercantile Trust Company, a corporation of the State of New York, as trustee, conveying to it as such trustee, for the purposes aforesaid, all the property of this company,
12 real, personal, and mixed, now owned or hereafter by it to be acquired, including its franchises, privileges, interests, road, equipment, telegraph line, machinery, depots and depot buildings, grounds, yards, and buildings, leases, contracts, income, tolls, rents, docks, and all other appendages and appurtenances now by it owned or hereafter by it to be acquired, with such provisions as are usual in like instruments and as the president by executing the same shall approve and adopt.

"Fourth. That the following form of bond, interest warrant, and trustee's certificate, is adopted and approved, to wit:

UNITED STATES OF AMERICA, *State of Ohio.*

No. —. One Thousand Dollars. $1,000.00.

*The Columbus, Sandusky and Hocking Railroad Company. First Mortgage Five per cent. Gold Bond.*

"The Columbus, Sandusky and Hocking Railroad Company, for value received, acknowledges itself indebted to the holder hereof in the sum of one thousand dollars ($1,000.00), which it promises to pay at its agency in the City of New York, on the first day of October, A. D. 1900, in gold coin, of the United States, of its present standard of weight and fineness, together with interest thereon in like gold coin at the rate of five per centum (5 per centum) per annum from the first day of November, A. D. 1895, interest payable on the first days of April and October of each and every year, upon presentation and surrender of the annexed coupons as they severally become due and so long as the principal remains unpaid.

"This bond is one of a series of bonds of like tenor and date, numbered from 1 to 2,000, both inclusive, and in amount limited to two million dollars ($2,000,000.00), the payment of the principal and interest of which is secured by a first mortgage or deed of trust, duly executed and recorded under date of

November 9, 1895, made by said company to The Mercantile Trust Company, as trustee of all the property of this company, both real, personal and mixed, now owned or hereafter to be by it acquired.

"This bond shall not be valid until certified hereon by the trustee of said mortgage or deed of trust, to be one of the series of bonds referred to and described herein.

"It is expressly agreed between the holder of this
13 bond and all persons who are now or may hereafter become stockholders of The Columbus, Sandusky and Hocking Railroad Company, that, such stockholders shall in no wise be held individually liable for the payment of either the principal or interest of this bond under any law that may now be in force or that may hereafter be enacted, and all such liability on the part of any such stockholders made by statute or otherwise, is by the acceptance of this bond, by the holder hereof, expressly waived.

"This bond shall be transferable by delivery, but the ownership hereof may, at the request of the holder, be registered on the books of the company, and endorsed hereon by its registrar, after which no transfer hereof, unless so registered and endorsed, shall be valid, and that said company shall pay the principal hereof, to the party so registered as owner, unless the last transfer shall have been made and registered to "bearer," whereby transferability by delivery shall be restored and registry of transfer to bearer or otherwise may be made at the option of each successive holder. An office for the purpose of registry shall be kept by this company in the City of New York.

"In witness whereof, The Columbus, Sandusky and Hocking Railroad Company, has caused its name and corporate seal to be affixed, and these presents to be subscribed by its president and secretary, and the engraved signature of its secretary to be affixed to its several interest warrants hereto annexed, at the city of Columbus, in the state of Ohio, on this the ninth day of November, A. D. 1895.

THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY.

By —— ——, *President.*

Attest:

—— ——, *Secretary.*

(*Trustee's Certificate.*)

"This is to certify, that this bond is one of a series of bonds referred to and described in the mortgage or deed of trust within mentioned.

THE MERCANTILE TRUST COMPANY.

By —— ——, *President.*

14 (*Interest Warrant.*)

"The Columbus, Sandusky and Hocking Railroad Company will pay the bearer, on the first day of ————, at its agency in the City of New York, twenty-five dollars ($25.00), the same being six months' interest then due upon its bond No. ——.

—— ——, *Secretary.*

Now this indenture witnesseth, that the party of the first part, in pursuance of said resolutions, for and in consideration of the premises and the sum of one dollar ($1.00), to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and for the better securing of the punctual payment of each and all of the bonds aforesaid, and the interest thereon, doth by these presents grant, bargain, sell, alien, remise, release, assign, convey, and confirm unto the said party of the second part, its successors and assigns, all and singular the aforesaid railroad of said company, its lands, tenements and hereditaments, rights of way, fixtures, buildings, bridges, piers, docks, wharves, fences, structures, railways, ties, locomotives, tenders, engines, cars, carriages, equipment, machinery, tools, implements, materials, chattels, franchises, privileges, rights, interests, telegraph lines, rents, tolls, incomes, revenue, resources, reservations, benefits, investments, leases, contracts, assets, and estate, legal and equitable, which are now by it owned or hereafter to be by it acquired or in any way belonging or appertaining to its said railroad.

To have and to hold the above-mentioned property and estate hereby conveyed or intended to be conveyed, with all and singular, the reservations, remainders, issues, privileges, and appurtenances now or hereafter belonging or in any wise appertaining thereto, unto the said party of the second part, its successors and assigns, forever.

In trust, nevertheless, for the persons and corporations and for the benefit, security and protection of the persons and corporations who shall be or become the owners and holders of or lawfully entitled to demand and receive payment of the said bonds and interest warrants attached thereto, equally pro rata, without preference or priority of one over another and upon and for the trusts, uses and purposes, and subject to the conditions and provisions herein expressed and declared.

15 Provided, however, and these presents are upon the expressed condition that, if the party of the first part, its successors or assigns, shall well and truly pay, or cause to be paid, all taxes that may be lawfully assessed against said property, and shall pay unto the holders of said bonds to

be issued as aforesaid, the principal and interest to become due thereon to the said holders, at the time and in the manner stipulated in said bonds and interest warrants, according to the true intent and meaning thereof, then these presents, and the estate and rights hereby granted, shall cease and determine and be void, otherwise to be and remain in full force and effect.

Provided, further, that this deed shall not operate or be held to prohibit the party of the first part, with the written consent of the trustee, from selling and conveying or otherwise disposing of, for the use and benefit and maintenance of said railroad, free from the incumbrance and trusts hereof, any real and personal property now owned or hereafter to be acquired by said company, which at any time can not be advantageously used in the proper and judicious operation, management or maintenance of said railroad. And it is agreed that in case any such sale, conveyance, or other disposition of property, the written certificate of the president of said railroad company under its corporate seal and attested by its secretary, setting forth that said property (which shall be designated in said certificate) can not be advantageously used in the proper and judicious management and operation of said railroad, shall, upon being lodged with said Trust Company, be conclusive evidence to it of the truth of the statement contained therein. But the proceeds of any such sale or property substituted therefor shall be and become subject to the lien of these presents.

Provided further, that until possession shall be taken of the property hereby conveyed upon a default as hereinafter provided, the said party of the first part for the purpose of proper operation, management and maintenance of said railroad shall be suffered to possess, manage and enjoy the same with its property, appendages, and appurtenances, and to take, use and apply the rents, profits, tolls, income, and personal property thereof for the purposes aforesaid and to distribute the net annual income to the stockholders of said company after paying the interest upon the said bonds in the same manner and to the same effect as if this deed had not been made.

It is hereby covenanted and agreed by the party of
16 the first part that if any default shall be made in the payment then due of the principal or interest of said bonds secured by this mortgage and stipulated to be paid in said bonds or interest warrants according to the tenor thereof, and the same shall remain due and unpaid for the space of (6) months, or if said party of the first part shall suffer or allow any lawful taxes or charges to fall in arrears, whereby the security of this mortgage may be impaired, then the party of

the first part shall, upon the demand of the party of the second part or the trustee or trustees for the then time being, forthwith surrender to such trustee or trustees, its or their agent or agents, the actual possession of all and singular, the property, assets and estates hereby conveyed or intended to be conveyed, together with all books, records, papers, and accounts of said company, to hold, use, and manage and receive the rents, issues, income and property thereof, for the benefit of the holders of said bonds, and interest warrants making from time to time all needful repairs, alterations and additions, paying all taxes, proper costs, charges and expenses of so taking, holding and managing the same, including a reasonable compensation of said trustee or trustees from the income thereof; or if necessary, by the use or sale of such of its personal property as said trustee or trustees may deem just and right; and after paying all taxes, levies, assessments and any other charges of expenses, growing out of such possession and operation shall apply the remaining income and revenue from the said mortgaged property to the payment of all interests in default and maturing from time to time, and shall pay interest warrants, in the order of their respective priority and shall thereafter apply the residue upon the principal of the bonds outstanding. And when all arrearages of interest and principal, then due upon said bonds and taxes and charges, together with reasonable expenses and compensation of said trustee or trustees shall have been fully paid off and discharged to redeliver said estate and property to said party of the first part, its successors or assigns; or the second party upon taking possession of said property as aforesaid, may cause the same to be sold as hereinafter provided or other disposition to be lawfully made thereof.

That if the said party of the first part, its successors or assigns shall at any time hereafter make default or neglect or omit for any period exceeding six (6) months thereafter, after demand made, to pay the semi-annual interest on the
17 bonds hereby secured or intended to be secured, or any of them, then and in any such case of default in the payment of interest for six (6) months as above stated at the option of the holders of said bonds to the amount of one-half (1-2) of the amount thereof, then outstanding the whole principal sum of said bonds shall forthwith become due and payable, anything in said bonds or in these presents to the contrary notwithstanding. And in the case of default for six (6) months in the interest or in case of default in the payment of the principal of any of said bonds for six (6) months after maturity of the same as hereinbefore stated the said trustee or trustees for the time being upon the written request of the

holders of one-half (1-2) in amount of said bonds then outstanding and upon a tender of proper indemnity for costs, counsel fees and charges, if request be made on part of said trustee or trustees for such indemnity, counsel fees and charges, said trustee or trustees shall proceed to foreclose the equity of redemption of said first party by a proper suit in law or equity as provided by the statutes of Ohio either in the courts of Ohio or the courts of the United States of America, having jurisdiction thereof; and the party of the first part doth by these presents give its warrants or attorney irrevocable by which, whenever and so often as default shall be made by party of the first part, in the payment of either the principal or interest of any of said bonds or coupons, or any part thereof, as therein stipulated and hereinbefore stated, the said party of the first part doth hereby authorize and empower any lawful attorney at law of the State of Ohio to enter the appearance of said party of the first part without process, in any court or courts of competent jurisdiction to such bill or petition filed by said trustee or trustees, as hereinbefore stated, for the foreclosure of this mortgage and the sale of the premises and property by this deed granted and conveyed or intended by this deed to be conveyed; and if requested by said trustee or trustees, to consent, on behalf of said first party, that a receiver or receivers be forthwith appointed by the court to take possession of such premises and property aforesaid, or any part thereof, and of the books, papers, effects, and business of said company upon such terms as are usual and customary for courts to prescribe; and further, that a decree or order of sale shall forthwith be made of the whole or any part of the premises and property aforesaid without appraisement but under the direction of the court and to enter on behalf of the first party a stipulation not to delay or impede by appeal, exception, or petition
18 in error, or otherwise, the execution of such decree or order of sale.

Provided, however, that said second party shall not demand the surrender of the possession of said premises and property, or any part thereof, or file a bill or petition for the sale of the same, or for the foreclosure of this mortgage, unless first requested so to do in writing by the holders of at least one-half (1-2) in amount of the bonds hereby secured and then outstanding. That the proceeds arising from the sale made as hereinbefore provided, shall be applied as follows, to wit:

I. To paying said trustee or trustees all reasonable costs, charges and expenses, including taxes, counsel and attorney fees, and to indemnifying it or them from all liability in the premises.

II. To the payment of the interest due and secondly, the principal of the outstanding bonds in full, if there be sufficient; if not, pro rata.

III. To pay the surplus, if any, to the party of the first part, its successors or assigns.

The said trustee shall be under no obligations to recognize any person or persons, firm or corporation as holder or holders of any of the bonds hereby secured or to do or refrain from doing any act pursuant to the request or demand of any person or persons, firm or corporation professing or claiming to be such holder or holders of any of said bonds until such person or persons, firms or corporation shall have produced the said bond or bonds of which he or they claim to be the owner and holder and deposit the same with the said trustee and shall also have indemnified and save harmless the said trustee to its full satisfaction from any and all costs, expenses, outlays, counsel fees and other proper disbursements any other liability growing out of the compliance by the trustee with such request or demand as well as a reasonable and proper compensation to it in that behalf. Should any suit or other proceedings be brought in any court against the said trustee, as trustee under this indenture or by reason of any matter or thing growing out of or connected with the trusts hereby created or the premises affected thereby the trustee shall, thereupon notify the party of the first part of the fact by delivering such notice at or mailing the same to the office of the said party of the first part forthwith after its having received the same, and said trustee shall thereupon be under no obligation to enter an appearance by counsel or otherwise or to defend said suit or other proceedings until in-
19 demnified to its satisfaction for so doing. But the said party of the second part may appear in and defend the same without such indemnity if it shall elect to do so and be compensated therefor from the trust fund. In case at any time it shall be proper or necessary for the trustee to make any investigation respecting any fact or facts preparatory to taking or not taking any action or doing anything as such trustee the certificate of the president of the party of the first part, under the corporate seal, together with the affidavit of one or more of the directors of the said party of the first part, shall be sufficient evidence of such fact or facts to protect the trustee in any action it may take or anything it may do or refrain from doing by reason of the supposed existence of such facts. It shall be no part of the duty of the trustee to see to the recording of this indenture as a mortgage or conveyance of real estate or to the filing thereof as a chattel mortgage, or to do any other act which may be suitable or proper to be done for the continuing of the lien of this indenture or for giving notice of the existence of

such lien. Nor shall it be any part of the duty of the trustee to effect insurance against fire or other damage on any part of the mortgaged premises or property or to renew any policies of insurance upon the same. The trustee shall be responsible only for reasonable diligence in the management of the trusts hereby created and shall not be answerable in any case for the act or default of any of its agents, attorneys or employes selected with reasonable care or discretion. The trustee shall be entitled to be reimbursed for all proper outlays of every sort and nature by it incurred or made in the proper discharge of this trust and to receive a reasonable compensation for any duty it may at any time perform in the discharge of the same, and all such fees, commissions, compensation and disbursements shall constitute a lien on the mortgaged property.

It is hereby mutually agreed between the parties hereto, and with the holders and owners of any bonds issued and secured by this mortgage, that no action at law or suit in equity shall be maintainable by the holder or holders of any of the bonds issued hereunder to enforce payment of the interest and principal thereof until the trustee, or its successors, shall have been requsted, as above set forth, in writing, to take proper legal proceeding in the premises and shall have neglected or refused so to do.

It is expressly stipulated and agreed, and made an essential consideration by and between the parties hereto, repre-
20 senting, respectively, the stockholders of this company, party of the first part, and the holders of bonds to be issued and secured by this indenture, that, in no event shall the stockholders of the party of the first part, or any of them, be or be held personally liable for the payment of the principal or interest on said bonds under any law now in force or that may hereafter be enacted such individual liability on the part of the stockholders of the party of the first part, made by statute or otherwise, being, by the acceptance of the bonds secured by this indenture, by the holders of such bonds, expressly waived.

It is hereby mutually covenanted and agreed between the parties hereto that the party of the second part, or its successors in this trust, may resign and discharge itself of the trust hereby created by notice in writing given to the first party, such notice to be given at least three (3) months before such resignation shall take effect, or such other time as the first party shall accept as adequate; and whenever a vacancy or inability to act in such trust occurs from any cause whatsoever, the Board of Directors of the party of the first part, its successors or assigns, shall have the right to appoint a successor to fill the vacancy, which appointment shall be attested by the written certificate of the President and Secretary of said Railroad Company, under

its corporate seal and the written acceptance thereof by the corporation or persons appointed shall be filed in the general office of the first party, its successors or assigns.

If, however, such Board of Directors shall neglect or refuse for thirty (30) days to fill such vacancy, or if any other good cause shall be shown therefor, such vacancy may be filled by order of any court of competent jurisdiction, upon the proper application therefor by the holders of one-third (1-3) in amount of the bonds hereby secured and then outstanding, or by an agreement in writing between one-third (1-3) of such bondholders and the party of the first part.

Any trustee or trustees appointed to fill any such vacancy shall be vested with and entitled to all rights, title, interest and estate, powers, duty and trust herein conveyed and contained, the same as if originally named in the agreement.

It is further covenanted and agreed upon by the party of the first part that, for the better assuring and confirming to title and powers of said party of the second part, or its successors as shall lawfully succeed to this trust, especially in rela-
21 tion to such property, rights and interest, real and personal, as shall hereafter be acquired by the first party, its successors or assigns, that it will at any time, and as often as required by the second party or its successors, do such acts and make such further conveyances and assurances in law as said second party shall be reasonably advised by counsel learned in law are necessary or tend to carry out the object of the parties hereto.

It is further mutually agreed and understood between the parties hereto, that, upon the execution and delivery, the party of the first part shall make and execute, and the Trustee, party of the second part, shall identify and countersign the bonds to be secured hereby, and the second party shall forthwith, after such identification and counter-signature, deliver, upon the order of the President of the Railroad Company, all of the bonds hereby authorized and secured or intended to be secured by this indenture.

It is expressly agreed and understood by and between the parties hereto and the holder or holders of the bonds secured hereby, and it is made one of the conditions upon which the trust hereby created is accepted by the second party, that the second party shall not in any way be considered, or held to be responsible or answerable for the issue, delivery or negotiation of the bonds secured hereby.

In testimony whereof, the party of the first part has caused its corporate seal to be hereto affixed and these presents to be signed by its President and duly attested by its Secretary, and the party of the second part, in token of its acceptance, has

caused its corporate seal to be hereto affixed and these presents to be signed by its President and duly attested by its Secretary, on this, the ninth day of November, A. D. 1895.

THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY.
By N. MONSARRAT, *President.*

Attest:
H. D. TURNEY, *Secretary.*
[SEAL.]

Signed, sealed and acknowledged in the presence of
W. E. GUERIN,
E. L. McCUNE.

STATE OF NEW YORK, *New York County,* } *ss:*

The undersigned, The Mercantile Trust Company, hereby accepts and agrees to act as Trustee under the trust created
22 in the foregoing mortgage or deed of trust.

THE MERCANTILE TRUST COMPANY,
By H. C. DEMING, *Vice-President.*

Attest:
E. R. ADEE, *Secretary.*
[SEAL.]

Signed, sealed and acknowledged in the presence of
W. C. POILLON,
WILLIAM H. CLARKSON.

STATE OF OHIO, *Franklin County,* } *ss:*

Be it remembered, that on this, the ninth day of November, A. D. 1895, before me, a notary public in and for said county, personally came N. Monsarrat, President of The Columbus, Sandusky and Hocking Railroad Company, and H. D. Turney, Secretary of said company, respectively, and personally known to me to be the persons whose names are subscribed to the foregoing instrument as President and Secretary of said company, and severally acknowledged the same as and for the voluntary act and deed of said The Columbus, Sandusky and Hocking Railroad Company, by them severally and voluntarily done and executed for the purposes therein set forth, and the said President and Secretary acknowledged that they were well acquainted with the corporate seal of said Railroad Company, and

had the same in their custody, and attached said corporate seal of said Railroad Company to said instrument in my presence; and said President and Secretary did further acknowledge that the said seal of said Railroad Company and the signature of said Railroad Company was so affixed by the order of the Board of Directors of said Railroad Company, and that said President and Secretary each represented the office in which they claimed to act, having before that time been duly elected as such President and Secretary by the Board of Directors of said Railroad Company, and were still acting in such capacity; and said N. Monsarrat and H. D. Turney further acknowledged before me that the said signing, sealing and execution of the foregoing instrument was their, and each of their free act and deed, for the purposes therein set forth.

In testimony whereof, I have hereto set my hand and affixed my notarial seal this, the day and year last above mentioned.

[SEAL.] E. L. McCUNE,

*Notary Public in and for Franklin County, Ohio.*

23 STATE OF NEW YORK, }
*City and County of New York,* } *ss:*

I do hereby certify that, on this, the thriteenth day of November, A. D. 1895, before me, William H. Clarkson, a notary public residing in the city and county of New York, and a commissioner of deeds of the State of Ohio in New York, personally appeared H. C. Deming, the Vice-President of The Mercantile Trust Company, and E. R. Adee, the Secretary of said Trust Company, to me respectively personally known to be such, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, who, being by me severally sworn, did depose and say that he, the said H. C. Deming, resided in the city and county of New York, and that he, the said E. R. Adee, resided in the city and county of New York, and that he, the said H. C. Deming, was Vice-President, and that he, the said E. R. Adee, was the Secretary of said Trust Company; that they severally knew the corporate seal of the said Trust Company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was affixed thereto by said H. C. Deming, by authority of the Board of Directors of said Trust Company; and the said H. C. Deming further deposed and said that he signed his name thereto, by like authority, as such Vice-President and that he had signed, sealed and delivered the said instrument as his own free act and deed, and as the free act and deed of the said Trust Company, for the uses and purposes therein expressed.

And I do further certify that the foregoing instrument is executed in manner and form as required by the laws of the State of New York.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, the day and year first above written.

[SEAL.] WILLIAM H. CLARKSON,
*Notary Public, New York County (No. 44).*
*Commissioner for the State of Ohio in New York.* [SEAL.]

24 And afterwards, to wit, on the 2nd day of June, A. D. 1897, an entry was made upon the Journal of said court, clothed in the words and figures following, to wit:

Entry—Journal C, Page 237.

*Order Appointing Receiver.*

Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE, *Complainant*,
*against*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, *Defendant*.
} In Equity. No. 816.

Now on this 1st day of June, eighteen hundred and ninety-seven, this cause came on to be heard before the Hon. William H. Taft, upon the bill of complaint of the complainant, this day filed in the clerk's office of this court, and upon notice of motion of the complainant herein for the appointment of a receiver as prayed for in the bill of complainant with proof of due service thereof upon the defendant and Lawrence Maxwell, Jr., Esq., and Chas. C. Deming, Esq., appearing as counsel for the complainant, and W. E. Guerin, president and general counsel, appearing for the defendant Railroad Company, and the matter having been argued by counsel, and the court being fully advised in the premises, thereupon, after due deliberation, it was ordered, adjudged and decreed:

1st. That Samuel M. Felton be, and he is hereby, appointed receiver in this cause of all the property, real, personal and mixed, rights and franchises embraced in and covered by the mortgage or deed of trust executed by the defendant Railroad Company to the complainant herein, and bearing date the 9th day of November, 1895, wheresoever the same may be situated,

and of all the rents, profits and income accrued, and to accrue from said property or the operation thereof, with the usual powers of a receiver in like causes.

2. That said receiver be and he hereby is authorized and directed to take immediate possession of all and singular the premises whereof he is hereby appointed receiver, and have and hold the same as receiver of and under the orders and direction of this court; that he continue to run and operate and cause to be run and operated the said railroad owned, leased or operated by the defendant as the same is now operated for the common carriage of freight and passengers, keeping the premises and property, both real and personal in good condition and repair, to the end that said road may be operated efficiently and with safety to the public; and that as such receiver he have authority to collect and receive the income and tolls thereof; to make appropriate payments therefrom for all necessary rental expenses and charges, with full power to employ, pay and discharge from time to time in his discretion all claims of laborers, servants, agents, attorneys and counsel; to purchase and pay for all needful material and supplies; to settle and adjust with other roads all traffic and mileage balances, and other amounts due to other railroads growing out of the interchange of business and connected with the operation or use of cars in the usual course of business; and to pay all such balances and amounts now due and hereafter to accrue; all claims for losses, overcharges now due and unpaid or hereafter to accrue as in his judgment are proper to be paid as expenses of operation, or in the interest of the business or traffic to be conducted by him; to make, from time to time, in his best discretion, all needful and proper traffic arrangements with other roads for the interchange of business; to pay all taxes on the property, whereby he is hereby appointed receiver, and insurance premiums that may be now due and payable, and that may become due and payable during his receivership; to pay the employes, officials and other persons having claims for wages, services, materials and supplies due and to become due and unpaid growing out of the operation of the railroad of the defendant, including current and unpaid vouchers; to settle accounts incurred in the operation of the railroad of the defendant company; to pay any and all obligations accrued or accruing upon any equipment trusts made by the defendant Railroad Company; and for such purpose, as well as for the purpose of meeting the obligations of the pay rolls, said receiver is hereby authorized, in his discretion, to borrow such sums of money as may be necessary for such purpose not exceeding thirty-five thousand dollars. But said receiver will pay no claims against the said

Railway Company which have accrued due more than six months prior to the date of this order. Receiver is hereby authorized to defend any actions which may be brought against the company to establish claims, liens or demands
26 against the mortgaged property or against said defendant Railroad Company, which if maintained, might result in liens which would have priority over the mortgage sought to be foreclosed herein; and the said receiver is further authorized to prosecute, bring and maintain, with full power to compromise, adjust and settle, in his best discretion, all such actions, suits or controversies, which, in his judgment, are needful and proper to bring, maintain and preserve the property, rights and franchises embraced in or covered by said mortgage or deed of trust; and to protect any and all securities of the company now held or pledged as security for loans or otherwise by renewal of such loans or by payment thereof with authority to redeem such securities in such manner as may be for the best interests of the trust.

3. Said receiver is further ordered to forthwith execute a bond in this cause with one or more securities, duly approved as to form and sufficiency by this court or any judge thereof, in the sum of one hundred thousand dollars, conditioned for the faithful discharge of his duties in the premises.

4. It is further ordered that as soon as may be after said receiver has entered upon the performance of his duties, he ascertain and report the state, condition and circumstances of the property, and all the debts and liabilities charged thereon, and file the same with the clerk of this court; and that the said receiver keep full, true and accurate accounts of all and singular his actions and doings in the premises.

5. It is further ordered that said receiver, exercising due prudence and caution in the selection thereof, shall not be responsible for the wrongful acts of his servants and agents; that the said receiver shall not in any case incur any personal or individual liability in the operation of said line of railroad or otherwise in the premises, by reason of any act or thing done by him as such receiver, or by his agents, attorneys and servants; the said receiver acting in good faith and in the exercise of his best discretion.

6. And it is further ordered that all motions for interlocutory orders or relief in this cause by or on behalf of any party hereto, or by the receiver herein, shall be made upon notice by the moving party or parties of at least ten days, exclusive of the day of service, and on due proof of personal service of notice, unless the notice hereby required be waived in writing.

7. And it is further ordered that the said defendant
27 Railroad Company, and each and every of its officers, directors, agents and employes, and all persons whatso-

ever, be and they are hereby strictly commanded, required and enjoined forthwith, upon demand of said receiver, to deliver up and surrender to the said receiver, or to his duly authorized agent or agents, all and singular the premises whereof he is hereby appointed receiver, under the penalty attached by law to disobedience, and are hereby commanded and required to obey and conform to such orders as may be made from time to time by the said receiver, and are hereby enjoined from interfering in any way whatever with the possession or management of any part of the premises, or interfering in any way with the discharge of the duties of said receiver, and in the meantime and until the actual possession of the said property by the said receiver, it is ordered that the said Railroad Company, its officers, agents and attorneys be, and they are hereby, enjoined and restrained from disposing or parting with any of the said property, real or personal, excepting the payment of the necessary daily expenses of said road.

8. And it is further ordered that any party interested in the premises may apply to this court for further directions upon notice as aforesaid.

And afterwards, to wit, on the 7th day of June, A. D. 1897, came to the receiver and filed in the clerk's office of said court his certain application in this cause, which said application is clothed in the words and figures following, to wit:

*Application.*

The circuit court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE, *Complainant*,
*against*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, *Defendant*.

Application to the Honorable William H. Taft, Judge of the United States circuit court for the Northern and Southern Districts of Ohio.

28 Your petitioner would respectfully represent that, on the first day of June, 1897, he was duly appointed and qualified as receiver of the property and assets of the defendant, The Columbus, Sandusky and Hocking Railroad Company and that he is now acting as such receiver under the orders of this court.

That as such receiver, he would respectfully represent that, there are certain obligations and indebtedness which, prior to the appointment of said receiver herein, said defendant railroad company had incurrd in the maintenance and operation of said railroad and which indebtedness it is necessary to pay in order to further operate and maintain said railroad in the performance of its duties as a common carrier under the law and in the carrying on of its business.

That said indebtedness is for labor performed by its employes, for maturing and matured car trusts, for traffic balances, for interest on terminal property, for rentals, for taxes, for materials and supplies furnished said railroad company and for obligations necessarily incurred in the maintenance and operation of said railroad during a period of six months next preceding the appointment of said receiver herein.

Your petitioner further states that he is unable at this time to state what is exactly the aggregate of such obligations, but that he believes it will exceed the sum of two hundred thousand dollars ($200,000) and that in order to pay said obligations or so much thereof as may be necessary, it will require the sum of two hundred thousand dollars ($200,000) within the period of six months next following the appointment of said receiver herein.

Your petitioner further states that is for the best interest of the bondholders of said railroad and all other persons interested therein that such obligations be paid as speedily as possible.

Your petitioner further states that he is unable to meet such obligations or any part thereof from the receipts received from the operation of said railroad, but that in order to pay the same or any part thereof, it will be necessary for your petitioner as receiver, to borrow money therefor.

Your petitioner further says that he has good reasons to believe and does believe that with the authority of this court he will be able to borrow money to meet said obligations to the extent, at least, that will enable him to carry on the business of said railroad in a legitimate and proper manner.

29 Your petitioner further states that, in order to borrow said money it will be necessary for this court, not only to authorize this said receiver to borrow said money and issue certificates therefor, but that said money when borrowed and said certificates when so issued, by said receiver, therefor, that the same shall be secured by an order of this court, making the same a first and prior lien on all and singular the property of said railroad company now by it owned or hereafter by it acquired.

Your petitioner would therefore respectfully ask this court for the uses and purposes hereinbefore stated, to be authorized

to borrow not exceeding two hundred thousand dollars ($200,000) at such times as it may be deemed necessary by said receiver and to issue certificates in such amount or amounts as he may find necessary, which certificates before being issued shall be countersigned by the clerk of this court, and when so issued shall bear interest at a rate not to exceed six per cent. per annum (6 per cent.) interest payable semi-annually and which certificates shall mature not later than ——— year —— from their date and shall be paid out of the earnings of said railroad during the receivership after the payment of operating expenses or out of the proceeds of the sale of said railroad, first after the payment of costs herein incurred, whenever the same may be sold.

Respectfully submitted,

S. M. FELTON, *Receiver*,
By W. E. GUERIN, *his attorney*.

30 And afterwards, to wit, on the 7th day of June, A. D. 1897, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following:

Entry. C. 247.

The circuit court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE, *Complainant*, *against* THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, *Defendant*. } No. 816. Order.

This day this cause coming on to be heard before William H. Taft, judge of said court, upon the application of Samuel M. Felton, receiver of the property and assets of said railroad company for the court to grant authority authorizing the receiver here in to borrow money and issue his certificates therefor as such receiver in an amount not exceeding two hundred thousand dollars ($200,000) for the purpose of paying car trusts, maturing and matured, pay rolls, interest on terminal property, traffic balances, taxes and sundry other obligations created in and about the maintenance and operation of said railroad within six months next preceding and following the appointment of a receiver herein. The parties to this suit having been served with notice of this application consents to the hearing hereof this day as appears by within waivers filed herein and herewith.

The court having carefully examined said application and being fully advised in the premises, doth order that said receiver be and he is hereby authorized to borrow money for the purpose aforesaid in such amount or amounts, not to exceed two hundred thousand dollars ($200,000) as he may find necessary and shall issue his certificates, as receiver therefor, which certificates when so issued for moneys so borrowed or for payments of obligations as aforesaid, shall bear interest at the rate of not to exceed six per centum (6 per cent.) per annum, interest payable semi-annually and shall be payable out of the earnings of said defendant railroad while in charge of the receiver, first after such payments as may be necessary in the operation
31 of said railroad or out of the proceeds of the sale of said railroad property in event the same is sold before the bonds secured by the mortgage to the complainant herein are paid.

It is, by the court, further ordered, that, when said certificates are issued for money so borrowed or in payment of any obligation, mentioned in said application, that the same shall be a lien on all and sigular the property of said defendant, The Columbus, Sandusky and Hocking Railroad Company, now by it owned or by it hereafter acquired prior in right to the mortgage of complainant herein, provided, however, that the amount of money so to be borrowed by said receiver and said certificate issued therefor under this order shall not exceed the sum of $200,000.00 (two hundred thousand dollars) and shall be countersigned by the clerk of this court and registered by him in a record kept by him for the purpose, and provided that said certificates shall not be issued and sold at less than their face value.

The circuit court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE, *Complainant*,
*against*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, *Defendant*.

Service of notice for the application of the receiver herein for authority to borrow money and issue his certificates, as receiver is hereby waived by The Mercantile Trust Company, trustee, and permission is hereby granted to said receiver to present said application and have it heard at any time, without further notice to said Trust Company.

THE MERCANTILE TRUST COMPANY,
*Trustee.*
By LAWRENCE MAXWELL, JR., *Attorney.*

32 The circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE, *Complainant*,
*against*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, *Defendant*.

Service of notice for the application of the receiver herein for authority to borrow money and issue his certificates, as receiver, is hereby waived by The Columbus, Sandusky and Hocking Railroad Company and permission is hereby granted to said receiver to present said application and have it heard at any time without further notice to said railroad company.

THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY,
By L. W. NEEREAMER, *Assistant Secretary*.

And afterwards, to wit, on the 7th day of July, A. D. 1897, came the receiver by his solicitors and filed in the clerk's office of said court his certain supplemental petition in this case, which said supplemental petition is clothed in the words and figures following, to wit:

*Supplemental Petition of Receiver.*

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

MERCANTILE TRUST COMPANY, TRUSTEE,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, AND THE METROPOLITAN TRUST COMPANY.

Supplemental petition of the receiver for an order for Receiver's Certificates.

Samuel M. Felton, receiver, respectfully shows to the court that heretofore, on the 8th day of June, 1897, by an
33 order duly made and entered in this cause he was authorized to execute and negotiate certain certificates of indebtedness and to apply the proceeds to the purposes in said order mentioned, but that he has not yet issued any of said certificates.

That at the time of preparing the petition upon which said order of July 8, 1897, was granted, there was in the contemplation of your petitioner, as one of the objects to which the proceeds of said certificates should be devoted, certain payments to be made to one R. B. Hubbard, growing out of the following facts:

On or about March 29, 1893, said R. B. Hubbard entered into an agreement with one W. E. Guerin, acting for and on behalf of the defendant railway company's predecessors, and all of whose rights in said agreement are now vested in and belong to the defendant railway company and to your petitioner as receiver thereof, whereby said Hubbard sold to said Guerin the following lots or parcel of land, lying in the City of Sandusky, County of Erie, Ohio, more particularly described as follows, to wit:

Water lots Nos. 81, 82, 83, 84 and 85 for the consideration of $40,000, of which there has been already paid to said Hubbard by the defendant railway company and its predecessors, the sum of $10,000, with interest leaving unpaid of said purchase price the sum of $30,000 for the payment of which said Hubbard has a lien upon said property, and also on $20,000 of the first mortgage bonds of the defendant railway company, secured by the mortgage or deed of trust sought to be foreclosed herein, which bonds were deposited with said Hubbard by the defendant railway company prior to your petitioner's appointment as receiver herein, as additional security for the payment of said balance of purchase money.

The defendant Railway Company has expended considerable sums of money in the improvement of said property, which now constitutes an important and essential part of its terminals at Sandusky, Ohio.

Your petitioner is satisfied that said property is reasonably worth the sum of $30,000 and that the same is necessary for the proper and advantageous operation of the railroad property of the defendant railway company and as a part of its terminals in the City of Sandusky, Ohio, and that the payment of the balance of said purchase money to said Hubbard and the release of said Hubbard's lien upon said real estate and on said $20,000 of bonds held by him as collateral security
34 is for the best interest of the defendant Railway Company and its creditors, including the plaintiff herein The Metropolitan Trust Company, Trustee.

Your petitioner therefore prays for authority to deliver to said Hubbard $30,000 of said certificates or of the proceeds thereof, in payment thereof, in payment of the balance of purchase money due upon said property.

Your petitioner further represents that since his appoint-

ment as receiver herein he has borrowed the sum of $35,000, and used the same for the purpose of meeting the defendant Railway Company's pay rolls for the months of April and May, 1897, and he asks that he may apply said receiver's certificates authorized by said order of June 8, 1897, or the proceeds thereof, to the amount of $35,000 to repay the money so borrowed by him.

Your petitioner further represents that it will be necessary and for the best interests of the property in his charge and of the plaintiff and The Metropolitan Trust Company, trustee, to use the residue of said certificates or the proceeds thereof, viz.: to the amount of $135,000 in paying the car trust obligations of the defendant Railway Company, the pay rolls accruing, in making necessary repairs on said railroad and in meeting the expenses of operating the same, and prays for authority and the order of the court accordingly.

Your petitioner further shows upon information and belief that in a certain cause heretofore pending in the court of Common Pleas of Crawford County, Ohio, wherein The Metropolitan Trust Company of the City of New York, was plaintiff, and The Columbus, Sandusky & Hocking Railway Company was defendant, being cause No. 6491 certain certificates of indebtedness were issued by the receiver appointed in said cause under the authority of an order of said court of which, as your petitioner is informed, there was, or are claimed to be, now outstanding certificates amounting at par to $5,000,000, which are claimed by the holders thereof to be a paramount lien upon all the property of the defendant Railway Company. But your petitioner is not sufficiently informed, and therefore can not show to the court whether or not said certificates have the lien so claimed by holders thereof, or any lien whatsoever, and he therefore prays that the order hereby prayed and the order heretofore, on June 8, 1897, made herein, shall not be taken to prejudice or in any wise affect the lien, if any, as it may be hereafter established, of said receiver's
35 certificates issued under the orders of said Court of Common Pleas of Crawford County, Ohio.

SAMUEL M. FELTON, *Receiver.*

And afterwards, to wit, on the 7th day of July, A. D. 1897, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

## Entry. C-287.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, AND THE METROPOLITAN TRUST COMPANY.
} No. 816.

Now, on this seventh day of July, 1897, this cause came on further to be heard upon the supplemental petition this day filed by Samuel M. Felton, receiver, Lawrence Maxwell, Jr., appearing as counsel for the plaintiff and The Metropolitan Trust Company, trustee, of the defendant Railway Company's general mortgage appearing specially for the purposes of this hearing by Thomas G. Hillhouse, its solicitor, and John C. Ten Eyck, counsel, and it appearing to the court that none of the certificates heretofore authorized by order of this court dated the 8th day of June, 1897, have been issued it is now further ordered, adjudged and decreed, the plaintiff and said Metropolitan Trust Company, trustee, not objecting, that the said order so as aforesaid entered on the 8th day of June, 1897, be and the same is in all things ratified, approved and confirmed, and the certificates therein authorized to be issued by said Felton as receiver shall be a first lien upon all and singular the property of the said defendant, The Columbus, Sandusky & Hocking Railroad Company, now by it owned or by hereafter acquired, and upon the income thereof, and a prior right to the mortgage of the complainant herein and to the mortgage of said The Metrolopitan Trust Co., trustee, provided, however,
36 that nothing in this order or in said order of June 8, 1897, and nothing done pursuant thereto shall in any wise prejudice or affect the lien, if any exists, of the receiver's certificates issued and now outstanding under and in pursuance of the orders of the Court of Common Pleas of Crawford County, Ohio, in said suit No. 6591 of The Metropolitan Trust Company against The Columbus, Sandusky & Hocking Railway Company.

It further appearing to the court that one R. B. Hubbard has sold to the defendant Railway Company the following lots or parcel of land lying in the City of Sandusky, Erie County, Ohio, more particularly described as Water Lots Nos. 81, 82, 83, 84 and 85 for the price of $40,000 of which there has

already been paid to said Hubbard by the defendant Railway Company and its predecessors the sum of $10,000 with interest, leaving unpaid of said purchase price the sum of $30,000, for the payment of which said Hubbard has a mortgage lien upon said real estate, and also a lien on $20,000 of the first mortgage bonds of the defendant Railway Company, secured by the mortgage or deed of trust sought to be foreclosed herein, which bonds are held by said Hubbard as additional security for the payment of said balance of $30,000 of purchase money; and it further appearing that the defendant Railway Company has expended considerable sums of money in the improvement of said property, that it constitutes an important and essential part of its terminals at Sandusky, that said property is worth more than the balance of the purchase money now due thereon, and that the same is necessary for the proper and advantageous operation of the railroad of the defendant Railway Company, as part of its terminals in the City of Sandusky, Ohio, and that the defendant Railway Company is bound for the payment of the balance of said purchase money, and that the payment thereof and the release of the lien of said Hubbard on said real estate and on said $20,000 of mortgage bonds is for the best interests of the defendant Railway Company, and of its creditors, including the plaintiff and the Metropolitan Trust Company, trustee; it is now ordered that said Felton, receiver, be and he is hereby authorized to deliver to said Hubbard $30,000 of the certificates authorized by said order of June 8, 1897, or of the proceeds thereof, in payment of the balance of the purchase money due upon said property, upon receiving proper deeds of conveyance and release from said Hubbard, and also upon the delivery by said Hubbard to said receiver of said
37 $20,000 first mortgage bonds, now, as aforesaid, held by said Hubbard as collateral security.

It further appearing to the court that said Felton, receiver, since his appointment herein has borrowed and is now owing the sum of $35,000, which has been used by him for the purpose of meeting the defendant Railway Company's pay rolls for the months of April and May, 1897, it is now ordered that said receiver apply of the receiver's certificates authorized by said order of June 8, 1897, or the proceeds thereof, the amount of $35,000 for the payment of said money so as aforesaid borrowed by him.

It further appearing to the court that it will be necessary and for the best interests of the property in charge of said receiver, and for the best interests of the plaintiff and of the Metropolitan Trust Company, trustee, to use the residue of said certificates, or the proceeds thereof authorized by said

order of June 8, 1897, to wit, to the amount of $35,000 in paying the car trust obligations of the defendant Railway Company, the pay rolls accruing in connection with the operation of said railroad property, in making necessary repairs on said railroad and in meeting the expenses of operating the same, it is now ordered that the residue of said certificates, or the proceeds thereof, to wit, to the amount of $135,000 be used and applied by the receiver to and for said purposes.

And afterwards, to wit, on the 26th day of August, A. D. 1898, an entry was made upon the journal of said court in said cause, which said entry is clothing in the words and figures following, to wit:

Entry C.—497.

THE MERCANTILE TRUST CO.,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING R. R. CO. } No. 816.

Upon application of Winfield S. Gregg, by his attorneys, leave is granted to file an intervening petition herein, forthwith, and the same is filed.

38 And afterwards, to wit, on the 26th day of August, A. D. 1898, came Winfield, S. Gregg, by his attorneys, and by leave of court, filed in the clerk's office of said court his certain intervening petition in this case, which said intervening petition is clothed in the words and figures following, to wit:

*Intervening Petition of Winfield S. Gregg.*

United States circuit court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE, *Complainant*,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, *Defendant*. } No. 816.

Intervening petition of Winfield S. Gregg, of Zanesville, Ohio, against Sam'l M. Felton, receiver of The Columbus, Sandusky & Hocking Railroad Co., to require said receiver to pay certain claims heretofore ordered by the court to be paid, &c.

To the judges of the circuit court of the United States, southern district of Ohio, eastern division:

Your petitioner, Winfield S. Gregg, by leave of the court, files this his intervening petition in the above entitled cause and states:

First: That by order of the court, heretofore made herein, on the 2nd day of June, 1897, S. M. Felton was duly appointed and thereafter qualified as receiver of the Columbus, Sandusky & Hocking Railroad Company, defendant herein:

That in said order appointing said receiver, said receiver was, among other things, directed to pay the employes, officials and other persons having claims for wages, materials and supplies due, and to become due, and unpaid, growing out of the operation of the railroad of the defendant, including current and unpaid vouchers; to settle accounts incurred in the operation of the defendant company; to pay any and all obligations accrued or accruing upon any equipment trust made by the defendant railroad company and for such purposes, as well as for the purpose of meeting the obligations of
39 the pay-roll, said receiver was authorized in his discretion to borrow such sums of money as might be necessary for such purpose, not exceeding $35,000.00, and providing that said receiver should pay no claim against the said railroad company which had accrued due more than six months prior to the date of said order.

That thereafter, in accordance with said order, the said receiver borrowed the sum of $35,000.00 to pay said claims aforesaid and subsequently thereto, to-wit, on the 7th day of June, 1897, the said receiver duly filed his application herein representing to the court, among other things, that there were certain obligations and indebtedness which prior to the appointment of said receiver said defendant railroad company had incurred in the maintenance and operation of said railroad, which indebtedness it was necessary to pay in order to further operate and maintain said railroad in the performance of its duties as a common carrier under the law and in carrying on of its business;

That said indebtedness was for labor performed by its employes, for maturing and matured car trusts, for traffic balances, for interest on terminal property, for rentals, for taxes, for materials and supplies furnished said railroad company and for obligations necessarily incurred in the maintenance and operation of said railroad during a period of six months next preceding the appointment of said receiver, and that in order to pay said obligations the said receiver would require the sum of $200,000.00 within a period of six months next fol-

lowing, and that it was for the best interests of the bondholders, and other persons interested in said railroad, that said obligations should be paid, and that as he was unable to meet said obligations from the receipts received from the operation of said railroad it was necessary for said receiver to borrow money therefor, which said receiver, it is stated in said application, would be enabled to do, if authorized by the court to issue certificates in said amount of $200,000.00.

That in pursuance of said application on June 8th, in the year last aforesaid, said receiver was duly authorized to borrow money for the purposes aforesaid not to exceed $200,000.00 and to issue receiver's certificates therefor and made the same a lien on all and singular the property of the defendant company.

That thereafter, to-wit, on the 7th day of July, 1897, the said receiver further represented to said court that none of the certificates authorized by said order of June 8th, 1897, had been issued and that it would be necessary and was proper that the same or the proceeds thereof should be used for the payment of $35,000.00 theretofore borrowed under the order of June 2nd, 1897, and used in the payment of pay-rolls for the months of April and May, 1897, for the payment of one Hubbard of $30,000.00 due on account of certain real estate in Sandusky, Ohio, and the balance thereof, to-wit, $135,000.00 in paying the car trust obligations of the defendant railway company, the pay-rolls accruing in connection with the said railroad property in making necessary repairs on said railroad and in meeting expenses of operating the same.

And upon said application and representation of said receiver on said 7th day of July, 1897, the court so ordered that said $200,000.00 of certificates, the issue of which was ratified and confirmed by said last mentioned order, should be so used and applied as represented by said receiver.

That thereafter, to-wit, on the 2nd day of April, 1898, upon the application of said receiver the said receiver was authorized and directed to borrow money and issue receiver's certificates in the amount of $520,000.00, $160,000.00 for the purchase of automatic car couplers and $360,000.00 for certain car trust obligations.

Second: Your petitioner further states that, as he is informed and believes, in pursuance of the said several orders of the court, the said receiver has borrowed money and issued receiver's certificates and applied the same as ordered and directed by the court and as a result thereof has, up to this time, except in meeting the obligations of the pay-rolls and any and all obligations upon the equipment trusts made by the defendant railroad company and except as hereinafter stated,

been unable to pay the employes, officials and other persons having claims for wages, services, materials and supplies at the time of the appointment of said receiver due, and to become due, and unpaid, growing out of the operation of the railroad of the defendant, including current and unpaid vouchers, in pursuance of said order of June 2nd, 1897, and which accrued due less than six months prior to the date of said order of June 2nd, 1897, and that the claim of your petitioner hereinafter set forth, being a claim for materials and supplies which accrued due less than six months prior to the date of said order last mentioned and which said receiver was, by the terms of said order as aforesaid, authorized and directed to pay as aforesaid, still remains due and unpaid.

41 Third: Your petitioner further states that in pursuance of a contract duly made with the said Columbus, Sandusky & Hocking Railroad Company, on to-wit, the 1st day of December, 1896, your said petitioner sold and delivered in the months of May and on the first, second and third days of June, 1897, as to a part thereof, after the appointment of the said receiver under said order of June 2, 1897, to the said Columbus, Sandusky & Hocking Railroad Company and said receiver certain railroad materials and supplies, to-wit, railroad ties, the claim for which was one necessarily incurred and growing out of the operation and maintenance of the said railroad by the said defendant company and said receiver to the number and at the prices set forth in the account attached hereto and made a part hereof marked Exhibit "A", which said account, in accordance with said contract, became due and payable to your petitioner from said defendant railroad company and said receiver on the 25th day of June, 1897, and which said account aggregates the sum of $4,709.53, upon which there is now due and payable the said sum of $4,709.53, with interest at 6 per cent. from the 25th day of June, 1897.

That said account was duly presented to the said receiver as a claim against said receiver in said amount and as such allowed by said receiver for said sum of $4,709.53 for material furnished by your petitioner to said company and as a claim which accrued due within six months prior to the appointment of said receiver of said company a copy of which said allowance is hereto attached and made a part hereof, marked Exhibit "B".

Your petitioner further says that although a part of said ties were delivered to said defendant railroad company prior to the appointment of said receiver, that he is informed and believes and therefore alleges that a large portion thereof, if not all, were used by said receiver after his appointment as aforesaid in the maintenance and operation of said railroad company by him as such receiver.

Your petitioner further states that he also holds as claims against said defendant company and said receiver certain promissory notes given by said defendant railroad company in payment for certain materials and supplies sold and delivered to said railroad company and payment for which accrued due within six months prior to the appointment of said receiver.

(1) One note for $194.96, dated Columbus, Ohio, May 12, 1897, payable to the order of your petitioner sixty days after date at the Clinton National Bank, with interest at the
42 rate of 7 per cent. per annum from date, a copy of which said note is hereto attached and made a part hereof and marked Exhibit "C".

(2) One note for $200.00, dated Columbus, Ohio, May 12th, 1897, payable to the order of your petitioner ninety days after date, at the Clinton National Bank, with interest at the rate of 7 per cent. per annum from date, a copy of which said note is hereto attached and made a part hereof and marked Exhibit "D".

(3) One note for $300.00, dated Columbus, Ohio, May 25th, 1897, payable to the order of your petitioner sixty days after date at the Clinton National Bank, with interest at the rate of 7 per cent. per annum from date, a copy of which said note is hereto attached and made a part hereof and marked Exhibit "E".

(4) One note for $300.00, dated Columbus, Ohio, May 25th, 1897, payable to the order of your petitioner ninety days after date, at the Clinton National Bank, with interest at the rate of seven per cent. per annum from date, a copy of which said note is hereto attached and made a part hereof, and marked Exhibit "F".

(5) One note for $300.00, dated Columbus, Ohio, May 25th, 1897, payable to the order of your petitioner ninety days after date, at the Clinton National Bank, with interest at the rate of 7 per cent. per annum from date, a copy of which said note is hereto attached and made a part hereof, and marked Exhibit "G".

(6) One note for $400.00, dated Columbus, Ohio, May 25th, 1897, payable to the order of your petitioner, sixty days after date, at the Clinton National Bank, with interest at the rate of 7 per cent. per annum from date, a copy of which said note is hereto attached and made a part hereof, and marked Exhibit "H".

(7) One note for $400.00, dated Columbus, Ohio, May 25th, 1897, payable to the order of your petitioner, ninety days after date, at the Clinton National Bank, with interest at the rate of 7 per cent. per annum from date, a copy of which said note is

hereto attached and made a part hereof, and marked Exhibit "I".

That all of said notes aggregating $2094.96 are due and unpaid, with interest on $394.96 at the rate of 7 per cent. per annum from the 12th day of May, 1897, and on $1,700.00 at the rate of 7 per cent. per annum from May 25th, 1897.

Fifth: Your petitioner further states that the total amount due from said defendant railroad company and said receiver on account of the claims above set forth is the sum of $6,804.49, with interest as heretofore stated. The said receiver is
43 unable to pay the same, although admitting the validity thereof, out of the net earnings of said property in his hands.

That as the amount heretofore authorized to be borrowed, or receiver's certificates to be issued therefor, has been used and applied by said receiver as heretofore ordered by the court, and as above stated, the said receiver is not authorized to borrow further sums of money upon receiver's certificates at this time to pay the said claims, nor is he able to carry out the said order of June 2nd, 1897, directing him to pay said claims, among others, which had accrued within six months prior to his said appointment.

That said road has not as yet been sold, nor as your petitioner is informed and believes is there at the present time any prospect for the immediate sale thereof and the payment of said claims.

That said claims in the form in which they now are can not be negotiated by your said petitioner nor otherwise made available to your petitioner and that to compel your petitioner to further await the sale of said road, or the reorganization thereof by the bondholders and to be deprived of the money due upon said claims, would work great hardships upon your petitioner.

That said claims are a lien upon said road prior to the claims of the complainant or defendants herein and are entitled to rank with and be paid equally with the receiver's certificates heretofore authorized and issued by said receiver under the orders of the court, as well as the claims for wages, services, obligations upon car trusts and other claims and obligations which have heretofore been paid by said receiver and which to enable the said receiver to pay, receiver's certificates have been authorized by the court and issued by said receiver.

Wherefore your petitioner prays:

That the said claims amounting to $6,804.49, with interest at the rate of 6 per cent. per annum on $4,709.53 from the 25th day of June, 1897, on $394.96 at the rate of 7 per cent. per annum, from the 12th day of May, 1897, and on $1,700.00 at the rate of 7 per cent. per annum from the 25th day of May, 1897, may be

adjudged and declared by the court to be lawful and valid claims for materials and supplies due and unpaid, growing out of the operation of the railroad of the said defendant company and which accrued due after or within six months prior to the date of the appointment of said receiver and as such a lien upon said property in the hands of said receiver prior to the claim of the complainant and defendants to said original bill and of
44 equal rank and validity with the receiver's certificates heretofore authorized and ordered to be issued by the said receiver and issued by him herein.

That said receiver may be authorized and directed forthwith to pay the same as such; that if for any reason the said receiver has not at the time of making such order sufficient funds on hand to pay said claims that he may be authorized and directed to borrow money for such purpose and to that end be authorized and directed, if necessary, to issue receiver's certificates for the purpose of procuring the necessary funds to pay said claim, which said certificates shall be similar in form and of the same tenor, effect and priority as those heretofore authorized and ordered to be issued and sold, or otherwise used by said receiver, or that said property of the railroad company may be forthwith sold without further delay and free from the claims of all parties hereto, and the proceeds distributed in accordance with the priority of liens, as may be established by the court, and for such other and further relief as to the court may seem just and equitable.

And your petitioner will ever pray, etc.

C. T. MARSHALL, CLEVELAND & BOWLER,
*Solicitors for Winfield S. Gregg.*

C. T. MARSHALL,
HARLAN CLEVELAND,
*Counsel.*

UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division,* } *ss:*
*Muskingum County,*

Winfield S. Gregg, being first duly sworn, deposes and says: That he is the petitioner above named, that he has read the foregoing intervening petition and knows the contents thereof; that as to the facts therein stated on knowledge the same are true, and as to those stated on information and belief, he believes the same to be true.

And further deponent saith not.

WINFIELD S. GREGG.

Sworn to before me and subscribed in my presence this day of August, A. D. 1898.

[SEAL.] A. CLYDE REASONER,
*Notary Public, Muskingum County.*

45 EXHIBIT "A".

ZANESVILLE, OHIO, *June 3rd, 1897.*

C., S. & H. R. R. Co., Columbus, O. To W. S. Gregg, Dr. Dealer in All Kinds of Hard —— Wood —— Lumber. Dimensions, stock, cross-ties and railroad lumber a specialty.

June 3rd, by ties taken May Est., as per contract Dec. '96, as follows:

| | | |
|---|---|---|
| 9115-6x9 at 38 cts..... | $3463 70 | |
| 955-6x9 at 19 cts..... | 181 45 | |
| 2804-6x8 at 35 cts..... | 981 40 | |
| 461-6x8 at 18 cts..... | 82 98 | $4,709 53 |

EXHIBIT "B".

Circuit Court of the United tSates, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD Company. } No. 816.

This is to certify that W. S. Gregg has filed with me a claim against the Columbus, Sandusky & Hocking Valley Railroad Company, for the sum of forty-seven hundred and nine dollars, fifty-three cents ($4,709.53) for material furnished by him to said company, and that I have allowed the same as a claim which accrued due within six months prior to appointment of S. M. Felton, receiver of said company.

E. M. FISHER,
*Auditor for Receiver.*

EXHIBIT "C".

$194.96. COLUMBUS, OHIO, *May 12th, 1897.*

Sixty days after date we promise to pay to the order of W. S. Gregg, one hundred and ninety-four and 96-100 dollars,

46 at The Clinton National Bank, with interest at the rate of seven per centum per annum.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.

Value received.

By A. W. DUNNING, *Assistant Treasurer.*

No. 14230.

When due, July 12, 1897.

EXHIBIT "D".

$200.00. COLUMBUS, OHIO, *May 12th, 1897.*

Ninety days after date we promise to pay to the order of W. S. Gregg, two hundred dollars, at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.

Value received.

By A. W. DUNNING, *Assistant Treasurer.*

No. 14231.

When due, August 10th, 1897.

EXHIBIT "E".

$300.00. COLUMBUS, OHIO, *May 25th, 1897.*

Sixty days after date we promise to pay to the order of W. S. Gregg, three hundred dollars, at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.

Value received.

By A. W. DUNNING, *Assistant Treasurer.*

When due, July 24, 1897.

Countersigned:

W. E. GUERIN, *President.*

47 EXHIBIT "F".

$300.00. COLUMBUS, OHIO, *May 25th, 1897.*

Ninety days after date we promise to pay to the order of W. S. Gregg, three hundred dollars, at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.

Value received.

By A. W. DUNNING, *Assistant Treasurer.*

When due, August 23rd, 1897.

Countersigned:

W. E. GUERIN, *President.*

EXHIBIT "G".

$300.00. COLUMBUS, OHIO, *May 25th, 1897.*

Ninety days after date we promise to pay to the order of W. S. Gregg, three hundred dollars, at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.

Value received.

By A. W. DUNNING, *Assistant Treasurer.*

When due, August 23rd, 1897

Countersigned:

W. E. GUERIN, *President.*

EXHIBIT "H".

$400.00. COLUMBUS, OHIO, *May 25th, 1897.*

Sixty days after date we promise to pay to the order of W. S. Gregg, four hundred dollars at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.

Value received.

By A. W. DUNNING, *Assistant Treasurer.*

48 When due, July 24, 1897.

Countersigned:

W. E. GUERIN, *President.*

EXHIBIT "I".

$400.00. COLUMBUS, OHIO, *May 25th, 1897.*

Ninety days after date we promise to pay to the order of W. S. Gregg, four hundred dollars, at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.

Value received.

By A. W. DUNNING, *Assistant Treasurer.*

When due, August 23rd, 1897.

Countersigned:

W. E. GUERIN, *President.*

Said intervening petition being indorsed as follows, to-wit:

*Appearance.*

Appearance entered to the within intervening petition.

S. M. FELTON, *Receiver.*

By LAWRENCE MAXWELL, JR.,

Aug. 25|98. *Counsel.*

And afterwards, to wit, on the 28th day of September, A. D. 1898, there was filed in the clerk's office of said court two certain receipts of notice in this case, clothed in the words and figures following, to wit:

49 *Receipt of Notice.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING R. R., Defendant.

Received of Cleveland & Bowler, solicitors of Winfield S. Gregg, copy of intervening petition in the above entitled cause, and notice of the filing of said intervening petition.

ALEXANDER & GREEN,
*Solicitors for Complainant.*

*Receipt of Notice.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING R. R., Defendant,

Received of Cleveland & Bowler, solicitors of Winfield S. Gregg, copy of intervening petition in the above entitled cause, and notice of the filing of said intervening petition.

THE C. S. & H. R. R. CO.
By W. E. GUERIN, *Prest.*

And afterwards, to wit, on the 24th day of October, A. D. 1898, came the Metropolitan Trust Company of the city of New York, etc., complainant herein, and filed in the clerk's office of said court its certain dependent and ancillary bill
50 against the defendant, The Columbus, Sandusky & Hocking Railroad Company, *et al.*, which said dependent and ancillary bill is clothed in the words and figures following, to wit:

*Dependent and Ancillary Bill of Complaint of the Metropolitan Trust Company.*

Filed by leave.

W. H. T.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, as Trustees and in its individual right, Complainant,
*against*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY, Samuel M. Felton, Receiver, the Mercantile Trust Company, Trustee, the Railroad Equipment Company, the Pullman Palace Car Company, George W. Sinks, Trustee; Jonas M. McCune, Jacob Klee, the Second National Bank of Sandusky, A. W. Prout, Ed. H. Zurhorst, Hewson L. Peeke, Henry C. Strong, Frank Strang, James Flynn, John H. Waginet, D. L. C. Ransom, guardian of Webster H. Ransom, and Ross D. Ransom, minors; Rush R. Sloane and F. G. Hallett, Defendants.

To the honorable judges of the circuit court of the United States for the Southern District of Ohio, sitting in equity.

The Metropolitan Trust Company, of the city of New York,

a corporation duly organized and existing under the laws of New York and a citizen and resident thereof having its principal place of business in the city of New York, in said state, brings this its bill of complaint as trustee and in its in-
51 dividual right against the Columbus, Sandusky & Hocking Railroad Company, a corporation organized and existing under the laws of Ohio, with its principal office in the city of Columbus, in the said State, S. M. Felton, receiver of the Columbus, Sandusky & Hocking Railroad Company who is a citizen and resident of Cincinnati, in the State of Ohio; the Mercantile Trust Company, a corporation organized and existing under the laws of the State of New York, having its principal place of business in the city of New York, in said State, the Railroad Equipment Company, a corporation organized and existing under the laws of New Jersey, having its principal place of business at Summit, in said State, the Pullman Palace Car Company, a corporation organized and existing under the laws of Illinois, and having its principal place of business in the city of Chicago, in said State; George W. Sinks, Trustee, a citizen and resident of Columbus, State of Ohio, James M. McCune, a citizen and resident of Columbus, State of Ohio; Jacob Klee, a citizen and resident of Delaware, State of Ohio; the Second National Bank of Columbus; the Second National Bank of Sandusky, A. W. Prout, of Sandusky, Ed. H. Zurhorst, of Sandusky; Hewson L. Peeke, of Sandusky; Henry C. Strong, of Sandusky; Frank Stang, of Sandusky; James Flynn, of Sandusky; John H. Waginet, of Sandusky; D. L. C. Ransom, of Sandusky, guardian of Webster H. and Ross D. Ransom, minors, and Rush R. Sloane, of Sandusky, all citizens and residents of the State of Ohio, and in the Northern District thereof; and F. G. Hallett, a citizen and resident of the State of New York and the city of New York.

And thereupon your orator complains and says that as it is informed and believes to be true:

I. The defendant, the Columbus, Sandusky & Hocking Railroad Company, was on the 9th day of November, 1895, and now is a corporation organized and existing under the laws of the State of Ohio, and was and is a resident and citizen of said State, and fully authorized to construct, maintain and operate and did on said 9th day of November, 1895, own and operate a line of railroad from the city of Sandusky, in Ohio, in and through the counties of Erie, Huron, Sandusky, Seneca, Crawford, Marion, Delaware, Franklin, Fairfield, Perry, Muskingum, Morgan, Hocking, Athens and Washington, having its termini at the city of Sandusky, in Erie County, and at or near the city of Marietta, Washington County, all in the State of Ohio.

52 II. Your orator, the Metropolitan Trust company, of the city of New York, was, at the times hereinafter mentioned and still is a corporation organized under the laws of the State of New York, and was and is a resident and citizen of said State, and fully authorized to hold and execute the trusts hereinafter described, and to make investments of money in notes and securities of the nature of those hereinafter described.

III. On or about the 9th day of November, 1895, the said Columbus, Sandusky & Hocking Railroad Company, in due exercise of its corporate powers, executed and delivered under its corporate seal to your orator, as trustee, for the purpose therein described, its corporate bonds for an amount not exceeding the sum of $10,000,000 payable in gold coin of the United States of the present standard of weight and fineness at the agency of the company in the city of New York, on the first day of January, 1946, with interest at the rate of two and one-half per centum per annum, from January 1, 1896, to January 1, 1898, and three per centum per annum from January 1, 1898, to January 1, 1900, and four per centum per annum, thereafter interest payable semi-annually on the first days of January and July in each year; said bonds to be issued in a series numbered from 1 to 10,000, inclusive, for the sum of $1,000 each, with interest warrants thereto attached for the payment of interest as aforesaid due upon each bond.

IV. To secure the payment of the principal and interest of said bonds, the said Railroad Company on or about the 11th day of November, 1895, being thereunto duly authorized by law and by its directors and stockholders, did execute and acknowledge, and did deliver unto your orator as trustee, its certain mortgage or deed of trust of the same date, a copy of which is hereto annexed and marked Exhibit A, and made a part hereof, and therein and thereby did grant, bargain, sell, alien, remise, release, assign, convey and confirm unto your orator as trustee and its successors in trust all the aforesaid railroad of the said company, its lands, tenements, hereditaments, buildings, ties, bridges, piers, fences, structures, railway, railway yards, sidings, locomotives, tenders, engines, cars, carriages, equipment, machinery, tools, implements, materials, docks, wharves chattels, franchises, privileges, rights, interest, telegraph lines, rents, tools, incomes, revenues, resources, reservations, benefits, investments, assets and estates, legal and equitable of every kind and character which were then owned or should thereafter be acquired by said Railroad Company or in any way belonging or appertaining to said railroad.

53 Said mortgage was and is the proper act and deed of said Railroad Company, and was made and delivered by it in all respects in due conformity to law; and the same was duly filed and recorded in the offices of the respective recorders in the several counties in the State of Ohio in which the property of the said Railroad Company is situated; and was and is a valid and subsisting lien upon all the railroads and branches of the said Columbus, Sandusky & Hocking Railroad Company above described, including the right of way on the land occupied thereby, together with all the appurtenances and improvements, materials, rights, privileges and franchises unto the said railroad belonging, or in anywise appertaining, and all rolling stock and equipment whatsoever, and the income, tolls, issues and profits thereof; subject only as to certain portions of the said premises of such prior and superior liens as are hereinafter set forth and admitted.

V. Of the said issue of bonds, those numbered from 2,545 to 10,000, both inclusive, were thereafter identified and countersigned by your orator and delivered to the said Columbus, Sandusky & Hocking Railroad Company, or its order as requested thereto by the said Railroad Company's Board of Directors and are now outstanding, as your orator is informed and believes, in the hands of bona fide holders for value. For bonds numbered from 1 to 2,544, both inclusive, your orator holds a scrip certificate of the said Columbus, Sandusky & Hocking Railroad Company, stipulating that said Company will issue and deliver said bonds when required.

VI. It was by the said mortgage or deed of trust provided that if the said Railroad Company, its successors or assigns, should at any time thereafter make default or refuse or neglect or omit, for any period exceeding six months after demand made, to pay the semi-annual interest due on the bonds secured thereby, or any of them, then in such case, at the option of the holders of said bonds to the amount of one-half the amount then outstanding, the whole principal sum of said bonds should become forthwith due and payable, anything in said bonds or in said mortgage or deed of trust to the contrary notwithstanding; and it was thereby further provided that in case of default for six months in the payment of interest upon said bonds or any of them, your orator should upon the written request of the holders of one-half the amount of said bond then oustanding

54 proceed to foreclose the equity of redemption of the said Railroad Company, either in the courts of Ohio or the courts of the United States of America having jurisdiction thereof.

VII. Said Railroad Company made default in payment on the first day of July, 1897, the first day of January, 1898, and

the first day of July, 1898, of the installments of interest due on each of said dates, respectively, on all of said bonds issued and outstanding as aforesaid, which said defaults still continue, and although payment of such interest and of the coupons representing the same has been duly demanded, the said Railroad Company has refused, neglected and omitted to pay the same, and neither on said first day of July, 1897, nor at any time since did said Railroad Company, or any person on its behalf, have or provide at the agency of said Railroad Company in the city of New York any funds with which to pay said installments of interest, or either of them, or any part thereof; and your orator alleges that no part of said installments of interest, or either of them, has been paid, but that the whole of said installments of interest remains due and unpaid.

VIII. Default having been made as aforesaid in the said semi-annual installments of interest due as aforesaid on the first day of July, 1897, the first day of January, 1898, and the first day of July, 1898, the holders of a large number of said bonds, to wit, more than a majority thereof now outstanding, by request in writing, signed by them and delivered to your orator, have requested your orator to proceed forthwith to enforce their rights under the said deed of trust and to foreclose the equity of redemption of said Railroad Company by such proper proceeding in law or equity as your orator should deem most expedient for the interests of said bondholders.

IX. No proceedings at law or equity for the recovery of the indebtedness secured by the said mortgagee or any part thereof have heretofore been had.

X. Your orator further shows that this is a suit of a civil nature in equity, and that the matter in dispute exclusive of interest and costs exceeds the sum of five thousand dollars.

XI. The defendant, The Mercantile Trust Company, is the trustee under a mortgage or deed of trust executed to it by the defendant, the Columbus, Sandusky & Hocking Railroad Company, November 9, 1895, to secure an issue of two thousand first mortgage bonds for the principal sum of $1,000 each, payable in gold coin of the present standard of weight and fineness, October 1, 1900, with interest at the rate of five per cent.
55 per annum, evidenced by attached coupons payable at the agency of the company in the city of New York, April 1st and October 1st of each year, wherein and whereby the said Railroad Company conveyed to the said trustee in trust the identical property thereafter conveyed in trust to your orator under the trust deed of October 11, 1895, hereinbefore described. Default was made in payment of the interest coupons due under the said deed of trust to the Mercantile

Trust Company, April 1, 1895, which default has since continued; and thereafter, to wit, on or about the 1st day of June, 1897, the said Mercantile Trust Company being thereto duly requested and authorized by a majority of the holders of said coupons, brought suit in this honorable court praying that the lien of its said deed of trust be foreclosed, and that the property of the said railroad heretofore described be sold to satisfy the same; and thereafter, on proper allegations made in the said bill, the defendant, Samuel M. Felton, was appointed receiver of all the property and franchises of the said Railroad Company aforesaid, and thereupon duly qualified under the orders of said court and took possession of said railroad property, all and singular, as an officer of this honorable court and still retains the possession thereof; and by reason of said possession and control of said property by this honorable court through its said receiver, your complainant is unable to resort to any other court to enforce its rights and the remedies to which it is entitled by reason of the facts herein complained of.

XII. The defendant, George W. Sinks, is trustee under a certain mortgage executed by David S. Gray and Eugenia D. Gray, his wife, to him as trustee, under date of June 1, 1892, to secure the payment of $200,000 represented by 200 notes of the Columbus, Shawnee & Hocking Railway Company for $1,000 each, and as such claims to have a lien upon the following described property, which is a part of the right of way and shop property of the defendant, the Columbus, Sandusky & Hocking Railroad Company, and which as such was conveyed to your orator under the terms or its mortgage, as aforesaid, to wit:

Beginning at an iron pin in the center of St. Clair avenue, 307 feet north of the center of Leonard avenue; thence north 86 degrees 36' west 1312 & 89 100 feet to an iron bolt in the center of a 20-foot alley parallel to the Harbor Road; thence north 37 degrees 44' east 597 & 66 100 feet along said alley to an iron bolt; thence south 86 degrees 56' east 593 & 56 45 100 feet to an iron pin in the center of St. Clair avenue; thence along the center of St. Clair avenue 491 & 22 100 feet to the place of beginning, being an original tract of land of 12,89 100 acres in the name of Sarah Shoemaker. Also lots Nos. eight (8), nine (9), ten (10), thirteen (13), and fourteen (14), of Sarah Shoemaker's addition to Clinton Township, Franklin County, Ohio, all fronting on Harbor Road, in said township, and containing 1,37 100 acres. Said 12,89 100 tract and said lots containing 1,37 100 acres, aggregating 14,26 100 acres. Excepting from said lands and lots

the 1,80|100 acres, which has been dedicated for street purposes on the south side of said lands, amounting in the aggregate to 1,43|100 acres, leaving 11,03|100 acres absolutely; and also conveying all the interest in Clinton avenue and a 20-foot alley, subject only to any interest the public may have by reason of the dedication heretofore by Sarah Shoemaker, having been made. All of said premises hereinafter described being in Clinton Township, Franklin County, Ohio.

Also a strip of land, being in the fourth quarter of the lands conveyed by Theodore Leonard, assignee to first township and eighteenth (18) range of the U. S. Military lands, beginning on the east boundary line of the lands conveyed by Theodore Leonard, assignee, to Sarah Shoemaker, by deed recorded in the record of deeds of Franklin County, aforesaid, in Volume 137, at pages 409 and 410, at an iron bolt at the southeast corner of a parcel of land conveyed by Christopher and Sarah A. Shoemaker, to Franklin P. Shoemaker, on or about the fifteenth day of March, 1890; thence with the southern line of said last named tract of land north 87 degrees 29' west 1442.37 feet to an iron bolt planted in the center of St. Clair avenue; thence with the center of St. Clair avenue south 2 degrees 56' west 301, 80|100 feet to an iron bolt; thence south 87 degrees 29' east 1444.25 feet to the eastern boundary of said Sarah A. Shoemaker's land. Thence north 2 degrees 44' east with said eastern boundary line 301,80|100 feet to the place of beginning, containing ten (10) acres of land, it being the same premises heretofore conveyed by Christopher Shoemaker and wife to William H. Shoemaker by deed dated 11th day of April, 1885, and recorded in deed book No. 179, pages 95 and 96 of the record of deeds in Recorder's Office, Franklin County, Ohio.

Also a strip of land, situated in Clinton Township, Franklin County, Ohio, described as follows, to wit.: Beginning at an iron pin in the center of a 20-foot alley East and parallel
57 to the Harbor Road and being at the Northwest corner to a 12,89|100 acre tract of land owned by Sarah Shoemaker; thence along the North line of said 12,89|100 acre tract, South 86 degrees 56' East 973,45|100 feet to an iron pin in the center of St. Clair ave., thence along the center of St. Clair ave. North 3 degrees 03' East 252,40|100 feet to an iron pin; thence South 86 degrees West 750,9|100 feet to an iron pin in said 20-foot alley; thence South 38 degrees 33' West 337,04|100 feet to the place of beginning, containing five acres of land and being the South half of a ten-acre tract of land owned by Devoice Shoemaker.

But your orator shows on information and belief that said asserted lien is not a valid and enforceable lien against the

said property, or if such is subordinate to the lien of your orator.

The holders of said notes are numerous and unknown to your orator, and they are therefore sued through their trustee as aforesaid.

XIII. The defendant, the Pullman Palace Car Company, claims to have a lien upon that part of the right of way of the defendant, the Columbus, Sandusky & Hocking Railroad Company, which was formerly a part of the right of way of the Columbus & Eastern Railroad Company, to wit: 33 miles of the right of way of the Columbus, Sandusky and Hocking Railroad Company, extending from Thurston to Redfield, but your orator is informed and believes that the said company has in fact no legal or valid lien upon the right of way as aforesaid, but that its lien, if any such it has, is confined to certain rolling stock consisting of cars, carriages and coaches supplied by said Pullman Palace Car Company to the said Railroad Company or its predecessors in interest, the title to which the said Pullman Palace Car Company still retains, and upon account of which sundry payments, the exact amount of which is unknown to your orator, have heretofore been made by the said Railroad Company or its predecessors in interest; and your orator alleges that pursuant to the statute of the State of Ohio in such case made and p-ovided, the said company may not exercise any alleged right to repossess itself of the said rolling stock or enforce any lien thereon without having first made previous tender to the said Railroad Company or its successors in interest of fifty per cent of the cash payments theretofore made to the said Pullman Palace Car Company on account of the said rolling stock.

XIV. The defendant, the Railroad Equipment Com-
58 pany, claims to have a lien upon and a right to take possession of certain rolling stock consisting of cars, coaches and locomotives, to which the said Equipment Company claims to own the legal title; but your orator is informed and believes and so alleges that all of said equipment has been fully paid for; that the lien of the Railroad Equipment Company, if it ever existed thereupon, has been discharged by virtue of the said payment; that the title thereto, both legal and equitable, has passed to the defendant Railroad Company; and that the lien of your orator's said deed of trust of November 11, 1895, has attached thereto.

But in the event that it be determined that any portion of said rolling stock still remains unpaid for, then your orator alleges that under the laws of Ohio the said Railroad Equipment Company may not repossess itself of the said rolling

stock without having first made a tender to the defendant Railroad Company or its successors in interest of not less than fifty per cent. of the cash payments theretofore received by the said Equipment Company upon the said rolling stock.

XV. The defendant, Jonas M. McCune, claims to have a lien to the extent of $2,711.85 with interest from July 1, 1898, by virtue of an alleged purchase money mortgage of said date, upon inlots Numbers 1553 to 1564, inclusive, in the F. J. Picard subdivision of outlot Number 217 in the City of Bucyrus, Crawford County, Ohio, which said lots are a part of the right of way and yard of the defendant Railroad Company and were included under the lien of your orator's deed of trust, but your orator alleges that the lien of the said McCune, if valid, likewise extends to and covers the whole of a six acre tract of land of which only the lots above referred to, comprising one and fifty-nine hundredths acres, are included under the terms of mortgage or deed of trust to your orator dated November 11, 1895.

XVI. The said Jacob Klee claims to have a lien to the extent of $783.33 with interest from October 19, 1892, by virtue of a purchase money mortgage upon a part of subdivision "E" of original outlot Number 1 in the city of Delaware, Delaware County, Ohio, being the same property conveyed by Jacob Klee to Lewis Ranck, October 19, 1892, and re-mortgaged by Lewis Ranck and wife to Jacob Klee as aforesaid, and thereafter conveyed by the said Ranck and wife to Richard Reynolds subject to the above mortgage, and by the said Reynolds and wife April 8, 1893, to the Columbus, Sandusky & Hocking
59 Railway Company, and thereafter by George W. Sinks and Daniel B. Hatch, purchasers at foreclosure sale of the property of said Railway Company to the defendant the Columbus, Sandusky & Hocking Railroad Company.

XVII. The defendant hereinafter named in this paragraph claim to have liens as hereinafter stated upon that part of the right of way and real estate of the defendant, the Columbus, Sandusky & Hocking Railroad Company which was conveyed in trust by the said Railroad Company to your orator under the mortgage or deed of trust of November 11, 1895, as aforesaid, known as parts of outlots numbered 24, 32 and 33, and bounded and described as follows: Beginning at the N. E. corner of outlot number 24, of Darling's survey of a 364-acre tract of the Isaac Miller's estate west of the city of Sandusky, Portland Township, Erie County, State of Ohio; thence S. 2 deg. 30' E., 515.5 feet to a point on the N. right of way line of the Lake Shore and Michigan Southern Railway Company right of way; thence N. 83 deg. 08' W., 802.4 feet along said

right of way line to a street; thence N. 2 deg. 30' W., 413.2 feet to S. right of way line of the Cleveland, Cincinnati, Chicago and St. Louis Railway right of way; thence N. 52 deg. 58' S., 445 feet to a point on dividing line between outlots numbers 32 and 25 of said tract; thence S. 2 deg. 30' E., 294 feet along said dividing line to the common corner of outlots 32, 25, 24, and 33 of said tract; thence S. 89 deg. 13' E., 395.2 feet to a point of beginning and containing (9.96) nine and ninety-six one hundredths acres more or less. Being the same real estate conveyed to the defendant, Ed. H. Zurhorst by the deed of George Marshall and Elizabeth, his wife, filed for record on November 7, 1892, with the recorder of Erie County, Ohio.

Also the following real estate in the City of Sandusky, Erie County, Ohio; situate in the city of Sandusky, County of Erie, and State of Ohio, and known as parts of outlots Nos. 25 and 9, beginning at the common corner of outlots Nos. 24, 25, 32 and 33 of Darling's survey of a 364-acre tract of Isaac Mills' estate west of the City of Sandusky in Portland Township, Erie county, State of Ohio, and extending thence south, 89 deg. 13' E., 395.2 feet to a street; thence N., 2 deg. 30' W., 251.8 feet along west side of said street; thence S. 57 deg. 20 W., 485.2 feet to a point beginning and containing (1.14) one and fourteen hundredths acres; also, beginning at a point S. 89 deg. 31' E., 345 feet from S. W. corner of outlot No. 9;
60 thence N., 52 deg. 04' E., 364.9 feet to middle of Mills Creek; thence at right angles S. 37 deg. 56' E., 68 feet; thence at right angles S. 52 deg. 04' W., 262.6 feet; thence N. 89 deg. 31' W., to point of beginning and containing (63) sixty-three hundredths acres, be the same more or less, but subject to all legal highways.

The defendant, the Second National Bank of Sandusky, claims a lien upon the said property by virtue of a mortgage for the sum of $5,379.90 payable ninety days from date and dated October 4, 1893, executed by the defendant, Ed. H. Zurhorst to the defendant A. W. Prout, and by him assigned to the said bank. But your orator says that the defendant Zurhorst had no authority to execute the said mortgage, nor had he any legal or equitable title in the property therein sought to be conveyed, nor is the said mortgage a valid lien in any respect upon the said real estate.

The defendant, the Second National Bank of Sandusky, claims to have a lien upon the above described property by virtue of a judgment recovered against the defendant Ed. H. Zurhorst August 18, 1897, in the Court of Common Pleas of Cuyahoga County, Ohio, and by virtue of an execution levied on the said estate under the said judgment.

The defendant, Hewson L. Peeke, claims to have a lien upon the above described real estate by virtue of a judgment recovered against the defendant Ed. H. Zurhorst August 16, 1897, in the Court of Common Pleas of Cuyahoga County, Ohio, and by virtue of an execution levied thereunder upon the said property.

The defendant, Henry C. Strong, claims to have a lien upon the above described property by virtue of a judgment recovered against the defendant, Ed. H. Zurhorst, August 16, 1897, in the Court of Common Pleas of Cuyahoga County, Ohio, and by virtue of an execution levied thereunder upon the said property.

The defendant, John H. Waginet, claims to have a lien upon the above described real estate by virtue of a judgment recovered against the defendant E. H. Zurhorst, August 16, 1897, in the Court of Common Pleas of Cuyahoga County, Ohio, and by virtue of an execution levied thereunder upon the said property.

The defendant, D. L. C. Ransom, as guardian of Webster H. Ransom and Ross D. Ransom, minors, claims to have a lien upon the above described property by virtue of a judgment recovered against the defendant Ed. H. Zurhorst, August 18, 1897, in the Court of Common Pleas of Cuyahoga County, Ohio, and by virtue of an execution thereunder levied upon the said property.

61 The defendant, Rush R. Sloane, claims to have a lien upon the above described property by virtue of a judgment recovered against the defendant Ed. H. Zurhorst, August 20, 1897, in the Court of Common Pleas of Cuyahoga County, Ohio, and by virtue of an execution thereunder levied upon the said property.

The defendant, James Flynn, claims to have a lien against the above described real estate by virtue of a judgment recovered against the defendant, Ed. H. Zurhorst, in the Court of Common Pleas of Erie County, Ohio, August 30, 1897, and by virtue of an execution Ed. H. Zurhorst, October 15, 1897, in the same court, and by virtue of an execution thereunder levied upon the said property.

The defendant, Frank Stang, claims to have a lien upon the above described property by virtue of a judgment recovered against the defendant Ed. H. Zurhorst, October 15, 1897, in the Court of Common Pleas of Erie County, Ohio, and by virtue of an execution levied thereunder upon the said property.

But as to each and all of the said alleged judgment creditors, your orator shows that their judgments and executions

against the said Zurhorst, so far as the same purport to be liens upon the above described property, are null and void, and constitute in fact no liens thereupon; that the said Ed. H. Zurhorst has not now and never had any beneficial interest in or to the above described property, but that the same was the property of the defendant Railroad Company, and its immediate predecessors in interest, the Sandusky & Columbus Short Line Railway Company from which it passed to the said defendant Railroad Company free from any of the said alleged liens whatsoever, and that the same has passed to and been conveyed to your orator by the defendant the Columbus, Sandusky & Hocking Railroad Company free from and unencumbered with any of the said alleged liens.

XVIII. Your orator is the successor in interest of the Columbus, Sandusky & Hocking Railway Company, a corporation organized under the laws of Ohio on January 21, 1894, by the consolidation of the Columbus, Shawnee & Hocking Railway Company and the Sandusky & Columbus Short Line Railway Company; that on July 5, 1895, the said Columbus, Sandusky & Hocking Railway Company, having defaulted its interest on certain of its mortgage deeds of trust outstanding, a suit was filed in the Crawford County, Ohio, Court of Common Pleas, entitled the Metropolitan Trust Company *vs.*
62 The Columbus, Sandusky & Hocking Railway Company, seeking a foreclosure of the said mortgages and a sale of the right of way, real estate, personal property and rolling stock of the said Railway Company; that the said railroad property thus foreclosed was as to the right of way and real estate in all respects the same, and as to the rolling stock substantially the same as that subsequently conveyed to the Columbus, Sandusky & Hocking Railroad Company, and thereafter conveyed by the said Railroad Company by way of mortgage as aforesaid to your orator; that in the foreclosure suit as aforesaid by order of July 28, 1895, $250,000 of receiver's certificates were authorized to be issued by Nicholas Monsarrat, the receiver theretofore appointed in said suit, which certificates were decreed to be a lien upon the aforesaid property of the Railroad Company superior to and prior to that of all other liens whatsoever; that on October 7, 1895, a further order was made in the said suit authorizing the said receiver to issue $250,000 additional receiver's certificates, which should likewise be a lien upon all the property as aforesaid of the said Railway Company equal to the lien of the receiver's certificates theretofore authorized and above referred to, and prior and superior to all other lines whatsoever; that by virtue of the said orders, the said receiver issued at the various times

thereafter, receiver's certificates to the extent of $500,000, which said crtificates were purchased for value and are now held by your orator in the sum of $250,000, and by the defendant, F. G. Hallett, in the sum of $250,000; that said certificates were recognized in all subsequent orders in the said suit and have since been recognized by the defendant, the Columbus, Sandusky & Hocking Railroad Company as a first and valid lien prior to that of all other mortgages and claimants whatsoever upon the whole of the above described railroad property, and more specifically upon the property conveyed to your orator under the trust deed heretofore declared upon; that said certificates are in fact a lien prior and superior to that of all other claims and mortgages whatsoever upon the said property; that the same are long since past due and unpaid; that the said Columbus, Sandusky & Hocking Railroad Company is wholly insolvent and no longer exists as a corporation, and that the Columbus, Sandusky & Hocking Railroad Company is likewise absolutely insolvent; and that the lien of the said certificates can only be realized upon by a foreclosure and sale of the said railroad property as herein described.

63 XIX. Under the suit heretofore filed in this Honorable Court by the Mercantile Trust Company, other certificates have been from time to time authorized by this Honorable Court to be issued by its receiver, S. M. Felton, to the aggregate sum of $520,000, of which your orator is informed something over $500,000 have been issued, and which certificates, under the orders of this Honorable Court, may be declared to be a lien upon the said railroad property superior to that of your orator as trustee, though inferior to that of your orator in its individual right as holder of the Monsarrat receiver certificates above referred to.

Your orator is further informed that it is the practice of this Honorable Court in the exercise of its equitable powers, to decree preferential rights to claimants having claims for labor performed and materials furnished to insolvent railroad companies within a limited period of time not exceeding six months prior to the time of the appointment of a receiver of such railroad companies; that there are a great number of claimants against the defendant the Columbus, Sandusky & Hocking Railroad Company holding claims of the nature herein described, which may thus be declared liens upon the said railroad property prior to the lien of your orator as trustee, but that the number and amount thereof are unknown to your orator, and that it is for the interest of your orator and all other creditors of the said Railway Company that the number

and amount of the said claims be ascertained and their respective priorities declared.

X. The best interest of all the aforesaid creditors and lien holders, both those holding liens prior to and those holding liens inferior to that of your orator in its individual right, and that of your orator as trustee, require that there should be a sale of the railroad property and franchises herein described as speedily as possible and that the same should be sold free of all claims and incumbrances of every nature whatsoever, particularly free from the claims, liens and incumbrances of those defendants made parties herein, or those who owe their preferential rights to the orders of, or to the exercise of the equitable powers of this Honorable Court.

Your orator therefore prays as follows:

(1) That the said mortgage of November 9, 1895, be foreclosed.

(2) That the lien of your orator as holder in its individual right of the Monsarrat receiver certificates as aforesaid be foreclosed.

64 (3) That your orator be decreed a lien upon the premises and railroad property hereinbefore mentioned and described, in virtue of such Monsarrat receiver certificates, prior to any lien or claim upon the said property whatsoever.

(4) That your orator, as trustee under the aforesaid deed of trust, be decreed to have a lien upon the said premises and railroad property hereinbefore described and mentioned, subject only to the prior liens of itself and F. G. Hallett, as sole holders of the Monsarrat receiver certificates above referred to, to the lien of the holders of the certificates duly issued under the orders of this Honorable Court by the present receiver of said Columbus, Sandusky & Hocking Railroad Company, S. M. Felton, to the lien of such holders of claims for labor performed and material furnished within a limited time prior to the appointment of S. M. Felton, as Receiver, as may be ascertained and accorded a priority by this Honorable Court, to the lien of the Mercantile Trust Company as trustee under the deed of trust above described, executed to it by the said Railroad Company, November 7, 1895, but superior to all other liens and claims whatsoever, and particularly to the claims and asserted liens of the defendants, the Pullman Palace Car Company, the Railroad Equipment Company, George W. Sinks, trustee, the Second National Bank of Sandusky, A. W. Prout, Ed. H. Zurhorst, Hewson L. Peeke, Henry C. Strong, Frank Stang, James Flynn, John H. Waginet, D. L. C. Ransom, guardian of Webster H. Ransom and Ross D. Ransom, minors, and Rush R. Sloane.

(5) That the defendant, the Pullman Palace Car Company and the Railroad Equipment Company be compelled to render statements of all moneys paid by the said Columbus,Sandusky & Hocking Railroad Company or any of its predecessors in interest, to-wit, the Columbus & Eastern Railroad Company, the Columbus & Eastern Railway Company, the Columbus, Shawnee & Hocking Railway Company, the Shawnee & Muskingum River Railway Company, the Sandusky & Columbus Short Line Railway Company, and the Columbus, Sandusky & Hocking Railway Company, upon any cars, coaches, locomotives or equipment the title to which may have been retained by either of said companies; and that should it then be determined that any balance of the purchase price be due either of said companies upon any of said equipment that the receiver of the said railroad property appointed by this court be prohibited
65 from turning over any of said equipment to either of said companies until not less than one-half of the purchase money or rentals heretofore paid said companies upon said cars be tendered into court as required by the Ohio Statute; and that the same when so tendered be subject to the liens herein declared in the order of their respective priorities.

(6) That the amount due your orator in its individual right and as trustee under the aforesaid deed of trust, together with the amounts due those defendants, whose claims are admitted to be prior hereto, be ascertained and determined by a reference to a master to be ordered by this Honorable Court.

(7) That in default of the payment of the sum or sums so found to be due to your orator in its individual right or as trustee within a time to be limited by the decree of this Honorable Court, that it be decreed that the defendants and all persons claiming under them any interest whatsoever in the said mortgaged property be absolutely and forever barred and foreclosed of all right or equity of redemption in and to the aforesaid described premises or any part thereof; that a sale of the whole of said premises, together with all other property and franchises owned by said Railroad Company and covered by your orator's deed of trust be ordered in accordance with the law and practice of this Honorable Court free from any lien or incumbrance of any nature whatsoever, and that in the sound discretion of this Honorable Court, a sale of the said property be so ordered prior to the final and complete adjudication of the claims herein described, or other claims, any liens that may attach thereto to be transferred to the proceeds of the sale, and that the proceeds thereof be applied first to the payment of the expenses of this suit including proper attorney's fees and compensation to your orator for its services as trustee

to be allowed by the court, and to the payment of such other liens as may be decreed prior to that of your orator, as trustee, in order of their respective priorities, and thereafter to the payment of the amount found to be due upon the said bonds and the coupons for interest thereon, and that any surplus remaining be applied in such manner as the court may direct.

(8) That if the proceeds of such sale shall be insufficient to pay the amounts due upon the bonds secured by your orator's said deed of trust, principal and interest, that the defendant Railroad Company be adjudged to pay the amount of any deficiency due to your orator or the holders of any of the said bonds or coupons.

66 (9) That a Receiver be appointed to take possession of the property mortgaged to your orator and the income, earnings and proceeds thereof, with power to continue the operation of the same, or that the Receiver heretofore appointed by this Honorable Court over the said railroad property, have his powers and duties extended by a proper order of the court entered in this suit.

(10) That this Honorable Court, by reason of the fact that the aforesaid described railroad property is already in the possession of an officer of this court, to-wit: S. M. Felton, Receiver, take jurisdiction of this suit and of each of the defendants made parties hereto, irrespective of their citizenship.

(11) That as to the defendants, the Columbus, Sandusky & Hocking Railroad Company, S. M. Felton, Receiver; George W. Sinks, Trustee; Jonas M. McCune, Jacob Klee, the Second National Bank of Columbus, the Second National Bank of Sandusky, A. W. Prout, Ed. H. Zurhorst, Hewson L. Peeke, Henry C. Strong, Frank Strang, James Flynn, John H. Waginet, D. L. C. Ransom, guardian of Webster H. Ransom and Ross D. Ransom, minors, and Rush R. Sloan, a subpoena be directed to issue, or a duplicate writ, as the case may be, and that as to the defendants the Pullman Palace Car Company, the Railroad Equipment Company, the Mercantile Trust Company and F. G. Hallett, who are non-residents of the State of Ohio, an order of appearance be made and that said order be served upon the said non-resident defendants, if practicable, wherever found, or if such service be not found practicable that said order be published as the court shall direct, and that by said subpoena, duplicate writ, and order, the said defendants, each and every one of them, be required to appear and answer this bill at the nearest practicable rule day, but not upon oath, which is hereby expressly waived, and assert what lien, if any, either of said defendants may have in the premises, and that in default thereof each and every one of said defendants be forever

barred from asserting any lien or claim against the property herein described hostile to those of your orator, or inconsistent with the admissions of this bill; and that your orator have such other and further relief as the nature of the case may require and as to your Honors shall seem meet.

And your orator will ever pray, &c.

METROPALITAN TRUST COMPANY OF THE CITY OF NEW YORK.

By BRAYTON IVES,

[SEAL.] *President.*

67 Attest:

BEVERLY CHEW, *Secretary.*

PARSONS, SHEPARD & OGDEN,
*Solicitors for Complainant,*
*111 Broadway, New York City.*

JOHN E. PARSON,
*Counsel.*
MORRISON R. WAITE,
*Of Counsel.*

UNITED STATES OF AMERICA,
*Southern District of New York,* } *ss:*

Brayton Ives, being duly sworn, says: I am president of the Metropolitan Trust Company of the City of New York, the complainant in the foregoing bill of complaint. I have read the foregoing bill of complaint, and know the contents thereof; the allegations therein contained, so far as they relate to my own acts, are true, and so far as they relate to the acts of others, I believe them to be true.

In regard to the matters or things alleged in the foregoing bill of complaint which are not within my personal knowledge, I have been fully informed and believe them to be true.

BRAYTON IVES.

Sworn to before me this 19th day of October, 1898.

[SEAL.] J. C. KLINK,
*Notary Public in and for Kings County, N. Y.*

Cert. filed in New York County.

## Exhibit A.

### *General Mortgage.*

This indenture, made this, the 11th day of November, A. D. 1895, between The Columbus, Sandusky & Hocking Railroad Company, a corporation duly organized under the laws of the state of Ohio, party of the first part, hereinafter mentioned as the "Railroad Company": and The Metropolitan Trust Company of the City of New York, a corporation duly organized under the laws of the state of New York, party of the second part, hereinafter referred to as the "Trustee."

68 Witnesseth:

That whereas, said railroad company, party of the first part, in pursuance of the powers conferred upon it by the laws of the state of Ohio, is the owner of and engaged in operating a line of railroad from the city of Sandusky, in Erie county, into and through the counties of Erie, Huron, Sandusky, Seneca, Crawford, Marion, Delaware, Franklin, Fairfield, Perry, Muskingum, Morgan, Hocking, Athens, and Washington, all in said state of Ohio, and with its termini in the city of Sandusky in Erie county, and the city of Marietta, in Washington county, state of Ohio; and

Whereas, in pursuance of a call duly made as by law required, all the stockholders of The Columbus, Sandusky & Hocking Railroad Company met at the general offices of said company in the city of Columbus, Ohio, on the 5th day of November, A. D. 1895, at 10 o'clock a. m., and did at said meeting unanimously pass and adopt the following resolutions, to-wit: to-wit:

"Resolved, That the Board of Directors of The Columbus,"
"Sandusky and Hocking Railroad Company, for the purpose"
"of meeting certain obligations assumed by said Railroad"
"Company, and for the purpose of securing money needed in"
"the carrying on of its business, and for any and all such other"
"purposes, as may be required and as are provided by the laws"
"of the state of Ohio are hereby authorized to issue a series"
"of general mortgage gold bonds, amounting in the aggregate"
"to ten million dollars ($10,000,000.00) and bearing interest"
"at the rate of two and one-half per centum (2 1-2 per cent.)"
"per annum, from January 1st, 1896, to January 1st, 1898, and"
"three per centum (3 per cent.) per annum from January 1st,"
"1898, to January 1st, 1900, and four per centum (4 per cent.)"
"per annum thereafter, interest payable semi-annually on the"
"first days of July and January each year, at the agency of"

"the company in the city of New York, both principal and"
"interest payable in gold coin of the United States of its pres-"
"ent weight and fineness; and said bond is to be issued in one"
"series to the amount of ten million dollars ($10,000,000.00)"
"numbered consecutively from one (1) to ten thousand (10-"
"000), both inclusive, each of said bonds being of the sum of"
"one thousand dollars ($1,000.00) and having interest war-"
"rants attached for the payment of the interest as aforesaid,"
"said interest warrants being duly authenticated by the en-"
"graved signature of the secretary of said railroad com-"
69 "pany, and the principal of the bonds being payable on"
"the first day of January, A. D. 1946; and to secure the"
"payment of the principal and interest of said bonds by a"
"mortgage in the nature of a conveyance or deed of trust to"
"be signed by the president of said railroad company under"
"its corporate seal and attested by its secretary and duly"
"acknowledged and delivered by the president in the name and"
"on behalf of this company to the Metropolitan Trust Com-"
"pany of the City of New York, as trustees, conveying to it"
"in trust for the purposes aforesaid, all the property of the"
"said The Columbus, Sandusky and Hocking Railroad Com-"
"pany, both real, personal or mixed, including its franchises,"
"privileges, resources, interest, road, equipment, machinery,"
"income, tolls, rents, leases with other railroad companies, ac-"
"counts, bills receivable, appendages and appurtenances, now"
"owned or hereafter to be acquired, with such provisions as"
"are usual in like instruments, and as the president by execut-"
"ing shall approve and adopt. Said bonds and the mortgage"
"securing the same to be executed and delivered as of the 11th"
"day of November, A. D. 1895; and"

"Resolved, further, that the bonds to be issued shall on"
"their face especially release any and all stockholders of said"
"railroad company from any and all liability on account there-"
"for on account of the failure of said railroad company to pay"
"either the principal or interest of said bonds by virtue of any"
"law now existing or that may hereafter be enacted."

Whereas, at a meeting of the board of directors of The Columbus, Sandusky and Hocking Railroad Company duly and lawfully called and held at the general office of said company in the city of Columbus, Ohio, on the 5th day of November, A. D. 1895, at 3 o'clock p. m. all of the members of said board being present, they did unanimously adopt and pass the following, to-wit:

"Whereas, The Columbus, Sandusky and Hocking Railroad"
"Company in pursuance of the powers conferred upon it by"
"the laws of the state of Ohio and pursuant to a resolution"

"heretofore on the 5th day of November, A. D. 1895, unani-"
"mously adopted by all the stockholders of this company at a"
"meeting of said stockholders duly called and held as by law"
"required, said stockholders did by vote unanimously au-"
"thorize the board of directors of this company to cause to be"
"issued a series of general mortgage gold bonds ag-"
70 "gregating ten million dollars ($10,000,000.00), and"
"did authorize the same to be secured by a mortgage in"
"the nature of a deed of trust upon all the property, rights"
"and franchises of this company, now owned or hereafter to be"
"acquired, in the manner and form as required by the laws of"
"the state of Ohio, therefore—"

"Resolved, that for the purpose of meeting certain obliga-"
"tions assumed by this company and for the purpose of secur-"
"ing money needed in carrying out of its business and for any"
"and all such other purposes as may be required and as are"
"provided for by the laws of the state of Ohio, it is expedient"
"and necessary for The Columbus, Sandusky and Hocking"
"Railroad Company to borrow, upon the credit of the corpora-"
"tion, its assets and property now owned or hereafter to be ac-"
"quired, the sum of ten million dollars ($10,000,000.00)."

"Second, That in order to effect this loan, there be prepared"
"for issue and negotiation ten thousand (10,000) bonds of this"
"company to be signed by its president and secretary and duly"
"authenticated by the cer-ficate of the trustee named in the"
"mortgage or deed of trust given for their security, each to"
"be for the sum of one thousand dollars ($1,000.00) bearing"
"date of the 11th day of November, A. D. 1895, and made pay-"
"able on the first day of January, A. D. 1946, to the holder"
"thereof, with interest thereon at two and one-half per centum"
"(2 1-2 per cent.) per annum from January 1st, A. D. 1896,"
"to the 1st day of January, 1898, and three per centum (3"
"per cent.) per annum from January 1st, 1898, to the first day"
"of January, 1900, and four per centum (4 per cent.) per an-"
"num thereafter until the principal sum of said bonds are"
"paid, interest payable semi-annually on the first days of July"
"and January of each year, at the agency of the company in"
"the city of New York, both principal and interest payable in"
"gold coin of the United States, of its present weight and fine-"
"ness; and such bonds to be issued in one series to the amount"
"of ten million dollars ($10,000,000) and numbered from one"
"(1) to ten thousand (10,000), both inclusive, each of said"
"bonds to have itnerest warrants attached for the payment"
"of the semi-annual interest as aforesaid, said interest war-"
"rants being duly authenticated by the engraved signature of"
"the secretary of said railroad company."

"Third, That to secure the payment of the principal and in-"
"terest of said bonds there be executed a mortgage in the"
"nature of a conveyance or deed of trust to be executed"
71 "and signed by the president of this company, under its"
"corporate seal, attested by its secretary and duly"
"acknowledged and delivered by the president in the name and"
"on behalf of this company to The Metropolitan Trust Com-"
"pany of the City of New York, a corporation of the city of"
"New York and state of new York, trustees, conveying to it as"
"such trustee for the purposes aforesaid, all the property of"
"this company, real, personal or mixed, including its fran-"
"chises, privileges, resources, interests, road, docks, right of"
"way, real estate, equipment, machinery, income, tolls, rents,"
"yards, leases with other railroad companies, bills receivable,"
"appendages and appurtenances of every kind and description,"
"now owned or hereafter to be acquired, with such provisions"
"as are usual in like instruments and as the president by ex-"
"ecuting shall approve and adopt."

"Fourth, That the following form of bond, interest warrant,"
"and trustee's certificate is adopted and approved, to-wit:"

"UNITED STATES OF AMERICA, *State of Ohio.*"

"No. ——. One Thousand Dollars. $1,000.00."

"*The Columbus, Sandusky and Hocking Railroad Company.*"
"*General Mortgage Gold Bond. Issue Limited to*"
"$10,000,000.00."

"The Columbus, Sandusky and Hocking Railroad Company"
"for value received, acknowledges itself indebted to the holder"
"thereof in the sum of one thousand dollars, which it promises"
"to pay at its agency in the City of New York, on the first day"
"of January, 1946, in gold coin of the United States of the"
"present standard of weight and fineness, together with inter-"
"est thereon, at the rate of two and one-half per centum"
"(2 1-2 per cent.) per annum from January 1st, 1896, to the"
"first day of January, 1898, and three per centum (3 per"
"cent.) per annum from January 1st, 1898, to the first day of"
"January, 1900, and four per centum (4 per cent.) per an-"
"num thereafter until the principal sum of this bond is paid,"
"in like gold coin, upon presentation and surrender of the an-"
"nexed coupons as they severally became due, and so long as"
"the principal remains unpaid. This bond is one of a series"
"of bonds of like tenor and date, and in amount limited to"
"$10,000,000.00, the payment of the principal interest, of"

"which is secured by a mortgage or deed of trust, duly"
72 "executed and recorded, under date of November 11th,"
"1895, and made by said company to the Metropolitan"
"Trust Company of the City of New York, Trustee, of all prop-"
"erty of this company, both real and personal, now owned or"
"hereafter to be acquired."

"This bond shall not be valid until certified hereon by the"
"trustee of said mortgage or deed of trust to be one of the"
"series of bonds referred to and described herein."

"This bond shall be and become a first lien upon the prop-"
"erty securing the same upon certain payments being made or"
"bonds exchanged as provided for in the mortgage securing"
"this issue of bonds."

"It is expressly agreed between the holder of this bond"
"and all persons who are now, or may hereafter become stock-"
"holders of The Columbus, Sandusky and Hocking Railroad"
"Company, that such stockholders shall in nowise be held in-"
"dividually liable for the payment of either the principal or"
"interest of this bond under any law that may now be in force"
"or hereafter be enacted, and all such liability on the part of"
"such stockholders, made by statute or otherwise, is by the"
"acceptance of this bond by the holder hereof expressly"
"waived."

"This bond shall be transferable by delivery, but the owner-"
"ship hereof may, at the request of the holder, be registered"
"on the books of the company, and indorsed hereon by the"
"registrar, after which no transfer hereof, unless so registered"
"and indorsed, shall be valid, and that said company shall"
"pay the principal hereof to the party so registered as owner,"
"unless the last transfer shall have been made and registered"
"to bearer,' whereby transferability by delivery shall be re-"
"stored and registry of transfer to bearer, or otherwise, may"
"be made at option of each successive holder."

"An office for the purpose of registry shall be kept by this"
"company in the city of New York."

"In witness whereof, said the Columbus, Sandusky and"
"Hocking Railroad Company has caused its corporate seal to"
"be affixed and these presents to be subscribed by its president,"
"and the engraved signature of its secretary to be affixed to"
"its several interest warrants hereto attached, at the city of"
"Columbus, in the state of Ohio, on the 11th day of Novem-"
"ber, A. D. 1895."

"THE COLUMBUS, SANDUSKY AND HOCK-"
"ING RAILROAD COMPANY,"
"By —— ——, *President.*"

"Attest:"
"—— ——, *Secretary.*"

73 *"Trustee's Certificate."*

"This is to certify that this bond is one of a series"
"of bonds referred to and described in the mortgage or deed"
"of trust within mentioned."

"THE METROPOLITAN TRUST COMPANY OF"
"THE CITY OF NEW YORK,"
"By —— ——, *President.*"

*"Interest Warrants."*

"The Columbus, Sandusky and Hocking Railroad Company"
"will pay the bearer, on the first day of July, 1896, at its"
"agency in the city of New York twelve dollars and fifty cents"
"the same being six months' interest then due upon its bond"
"No. ——."

"—— ——, *Secretary.*"

"The Columbus, Sandusky and Hocking Railroad Company"
"will pay the bearer, on the first day of July, 1898, at its"
"agency in the city of New York, fifteen dollars, the same"
"being six months' interest then due upon its bond No. ——."

"—— ——, *Secretary.*"

"The Columbus, Sandusky and Hocking Railroad Company"
"will pay the bearer, on the first day of July, 1900, at its"
"agency in the city of New York, twenty dollars, the same be-"
"ing six months' interest then due upon its bond No. ——."

"—— ——, *Secretary.*"

Now, this indenture witnesseth, that the party of the first part in further pursuance of said resolution for and in consideration of the premises and of the sum of one dollar ($1.00) to it in hand paid by the second party, the receipt whereof is hereby acknowledged, and for the better securing of the punctual payment of each and all the bonds aforesaid and the interest thereon, doth by these presents grant, bargain, sell, alien, remise, release, assign, convey and confirm unto the said party of the second part, its successors and assigns, all and singular the aforesaid railroad of said company, its lands, tenements, and hereditaments, leases with other railroad companies rights of way, fixtures, buildings, ties, bridges, piers, fences, structures, railways, railway yards, sidings, locomotives, tenders,
74 implements, materials, docks, wharves, chattels, franchises, privileges, rights, interests, telegraph lines, rents, tolls, incomes, revenues, resources, reservations, benefits,

investments, assets and estates, legal and equitable of every kind and character which are now owned or shall hereafter be acquired by said railroad company or in any way belonging or appertaining to said railroad.

To have and to hold, the above mentioned property and estate hereby conveyed or intended to be conveyed now or hereafter belonging or in any way wise appertaining thereto, unto the said party of the second part, its successors and assigns forever.

In trust nevertheless for persons and corporations and for the benefit, security and protection of the persons and corporations who shall be or become the owners and holders of or lawfully entitled to demand and receive payment of the said bonds and interest warrants attached thereto, equally pro rata, without preference or priority of one over another and upon and for the trust, uses, and purposes and subject to the conditions and provision herein expressed and declared. Provided, however, and these presents are upon the expressed condition that if the party of the first part, its successors or assigns, shall well and truly pay or caused to be paid all taxes lawfully assessed against said property and unto the holders of said bonds to be issued as aforesaid, the principal and interest to become due thereon to the said holders at the time and in the manner stipulated in said bond and interest war-ants according to the true intent and meaning thereof, then these presents and the estate and rights hereby granted shall cease and determine and be void, otherwise to be and remain in full force and effect.

Provided further, that, this deed shall not operate or be held to prohibit the party of the first part, with the written consent of the trustee, from selling and conveying or otherwise disposing of, for the use and benefit and maintenance of said railroad free from the incumbrances and trust thereof, any real and personal property now owned or hereafter to be acquired by said company, which at any time in the judgment of the Board of Directors of said railroad company can not be advantageously used in the proper and judicious operation, management of maintenance of said railroad but the proceeds of any such sale or property substituted therefor, shall be and become subject to the lien of these presents.

Provided further, that until possession shall be taken of the property hereby conveyed, upon a default as hereinafter provided the party of the first part, its successors
75 or assigns, for the purpose of proper operation, management and maintenance of said railroad shall be suffered to possess, manage and enjoy the same with its property, appendages and appurtenances and to take, use and apply the

rents, profits, tolls, incomes and personal property thereof for the purposes aforesaid and to distribute the net annual income to the stockholders of said company after paying the interest upon said bonds in the same manner and to the same effect as if this deed had not been made.

First, it is hereby covenanted and agreed by the first party that if any default shall be made in the payment when due of the principal or interest of the bonds secured by this mortgage and stipulated to be paid in said bonds or interest warrants according to the tenor thereof and the same shall remain due and unpaid for the space of six (6) months after demand shall have been made therefor, or if said party of the first part shall suffer or allow any lawful taxes or charges to fall in arrears whereby the security of this mortgage may be impaired, then the party of the first part shall, upon demand of the second party or the trustee or trustees for the then time being forthwith surrender to such trustee or trustees its or their duly authorized agent or agents, the actual possession of all and singular the property, assets and estates hereby conveyed, or intended to be conveyed, together with all books, records, papers and accounts of said company to hold, use and manage and receive the rent, issues, income and property thereof, for the benefit of the holders of said bonds and interest warrants, making from time to time all needful repairs, alterations and additions and paying all taxes, proper costs, charges and expenses of so taking, holding and managing the same, including a reasonable compensation to such trustee or trustees from the income thereof, or if necessary, by the use or sale of such of it- personal property as said trustee or trustees may deem just and right and after paying all taxes, assessments and any other charges or expense growing out of such possession and operation, shall apply the remaining income and revenue from the said mortgaged property to the payment of all interest in default and maturing from time to time, pay interest warrants in the order of their respective priority, and shall thereafter apply the residue upon the principal of the bonds outstanding. And when all arrearages of interest and principal then due upon said bonds and for said taxes and charges, together with reasonable expenses and compensation of said trus-
76 tee or trustees, have been fully paid off and discharged, to redeliver said estate and property to said party of the first part, its successors or assigns or the second party upon taking possession of said property as aforesaid may cause the same to be sold as hereinafter provided, or other disposition to be lawfully made thereof.

Second, if the said party of the first part, its successors or

assigns shall at any time hereafter make default or refuse to neglect or omit for any period exceeding six (6) months after demand made, to pay the semi-annual interest on the bonds hereby secured or any of them, then in such case at the option of the holders of said bonds to the amount of one-half (1-2) of the amount then outstanding, the whole principal sum of said bonds shall forthwith become due and payable, anything in said bonds or in these presents to the contrary notwithstanding. And in case of default for six (6) months in the interest and also in case of default in the payment of the principal of any of the said bonds for six months after maturity of the same and demand as hereinbefore stated has been made, said trustee or trustees for the time being upon the written request of the holders of one-half (1-2) in amount of said bonds then outstanding and upon a tender of proper indemnity for costs, counsel fees and charges, if request for such indemnity be made said trustee or trustees shall forthwith proceed to foreclose the equity of redemption of the first party by proper suit in law or equity as provided by the statutes of Ohio, either in the courts of Ohio or the courts of the United States of America having jurisdiction thereof and the party of the first part doth by these presents give its warrants of attorney irrevocable by which, whenever and so often as default shall be made by the said first party as hereinbefore stated, the said party of the first part does hereby authorize and empower any lawful attorney of the state of Ohio, to enter the appearance of the first party without process in any court of competent jurisdiction to any such bill or petition filed by said trustee as hereinbefore stated, for the foreclosure of this mortgage and the sale of the premises and property by this deed granted and conveyed or intended to be conveyed, and if requested by said trustee to consent on behalf of the first party that a receiver or receivers be forthwith by such court appointed to take possession of such property and premises aforesaid or any part thereof and the books, papers, effects, and business of said first party upon such terms as such court may prescribe; and further, that a decree or order of sale shall forthwith be made of the whole or
77 any part of the premises and property aforesaid without appraisement, but under the direction of the court and to enter upon behalf of this company a stipulation not to delay or impede by appeal, exceptions, petition in error, or otherwise, the execution of such decree or order of sale.

That the proceeds arising from the sale as hereinbefore provided shall be applied as follows, to wit:

1st. To paying such Trustee or Trustees all reasonable costs, charges and expenses, including taxes, counsel and attorney

fees, and to indemnify it or them from all liability in the premises.

2nd. To the payment of the interest due, and secondly the principal of the outstanding bonds in full, if there be sufficient, if not, then pro rata.

3rd. To pay the surplus, if any, to the party of the first part, its successors or assigns.

Third. It is further mutually agreed and understood between the parties hereto that, upon the execution and delivery of this deed of trust, the party of the first part shall make and execute, and the Trustee, party of the second part, shall identify and countersign all the bonds to be secured hereby, and thereupon they shall be distributed as follows, to wit:

I. Bonds to the number of two thousand two hundred and twenty-three (2223) numbered from one (1) to two thousand two hundred and twenty-three (2223), both inclusive, shall be held by said Trustee and used for the purpose of being exchanged for or sold, and the proceeds applied to the payment of the two million dollars ($2,000,000.00) of outstanding first mortgage 5 per cent. gold bonds of this company, at their maturity, or maturity of any extension of payment thereof.

II. Bonds to the number of two hundred and twenty-three (223) numbered from two thousand two hundred and twenty-four (2224) to two thousand four hundred and forty-six (2446), both inclusive, shall be held by said Trustee and used for the purpose of being exchanged for or sold, and the proceeds applied to the payment of the two hundred thousand dollars ($200,000.00) 6 per cent. real estate mortgage notes of The Columbus, Shawnee and Hocking Railway Company, at their maturity or the maturity of any extension of payment thereof.

III. Bonds to the number of ninety-eight (98), numbered from two thousand four hundred and forty-seven (2447) to two thousand five hundred and forty-four (2544), both inclusive, shall be held by said Trustee and used for the
78 purpose of being exchanged for or sold and the proceeds applied to the payment of the eighty-nine thousand dollars ($89,000.00) 6 per cent. coupon notes of The Columbus, Shawnee and Hocking Railway Company, at their maturity or the maturity of any extension of payment thereof.

IV. The bonds above named and described shall be used for no other purpose than that named above, provided, however, that if in the exchange or sale of said bonds, there should be a surplus of bonds remaining after the exchange or payment of the several items above named, or either of them, then and in that event such surplus bonds shall forthwith be delivered to the party of the first part on the order of its Board of Directors.

V. The remaining bonds of said issue to the number of seven thousand four hundred and fifty-six (7456), numbered from two thousand five hundred and forty-five (2545) to ten thousand (10,000), both inclusive, shall forthwith be delivered to the first party or its order when requested by its Board of Directors so to do.

Fourth. It is further mutually agreed and understood between the parties hereto that, upon the exchange or payment of the two million dollars ($2,000,000.00) of first mortgage bonds above mentioned and the two hundred thousand dollars ($200,000.00) of real estate mortgage notes above mentioned, that then and thereupon this indenture and the bonds secured hereby shall be and become the first and prior lien upon all and singular the property of the said The Columbus, Sandusky and Hocking Railroad Company hereinbefore described or that may be hereafter acquired.

Fifth. It is hereby mutually agreed between the parties hereto and with the holders and owners of any bonds issued and secured by this mortgage, that no action at law or suit in equity shall be commenced or maintainable by the holder or holders of any of the bonds issued hereunder to enforce payment of the principal or interest thereof until the Trustee herein or its successor shall have been requested in writing to take proper legal proceedings and shall have neglected or refused so to do, for a period of at least six (6) months thereafter.

Sixth. Said first party hereby covenants and agrees that it will at the time of maturity or at the time of agreed extension of maturity of any and all the bonds and notes described in the third paragraph, pay the same, and each and all of them, and will forthwith, upon such payment, cause the release
79 of the mortgages mentioned in items I and II of said third paragraph securing the same to be entered of record and to be canceled.

Seventh. Whenever a vacancy or vacancies shall occur in this trust from resignation, refusal or incapacity to act of the second party hereto, or from any cause whatever, said The Columbus, Sandusky and Hocking Railroad Company shall have full power and authority, by resolution of its Board of Directors, to declare such vacancy, and nominate and appoint a new Trustee or Trustees for the purpose of filling the vacancy or vacancies so caused. Such nomination and appointment shall be made by instrument of writing, executed under the corporate seal of said Railroad Company, and the acceptance of the trust by such new Trustee or Trustees shall be endorsed upon such instrument of writing and the Trustee or Trustees so appointed shall be vested with the same trusts and have the

same powers as the Trustee herein named, and shall be subject to all the stipulations and conditions of this indenture; provided, such Trustee shall be some Trust Company of New York City, which is lawfully qualified to act in such capacity.

Eighth. It is hereby covenanted and agreed, that this trust is accepted upon the express condition that, said Trustee shall not, nor shall any future Trustee, incur any liability or responsibility whatever in consequence of permitting or suffering said Railroad Company, its successors or assigns, to retain or be in possession of the railroad, estate, property and premises hereby mortgaged, or agreed or intended so to be, or any part thereof, and to use and enjoy the same; nor shall said Trustee, or any future Trustee, be or become responsible or liable for any destruction, deterioration, loss, injury or damage which may be done or occur to the railroad, estates, property and premises hereby mortgaged, or intended so to be, by said Railroad Company, its agents or such Trustee be in any way responsible for the consequences of any breach on the part of said Railroad Company, of any of the covenants herein contained, or of any act of the agents or servants of said Railroad Company, nor shall any such Trustee be or become liable or responsible for any cause, matter or thing, except for his or its gross negligence or willful or intentional breach of any trust herein expressed and contained.

Ninth. The Railroad Company shall and will, from time to time, hereafter, upon the demand of the Trustee, grant, convey, confirm, assign, transfer and set over unto said Trustee, so all the real and personal estate and property, corporate rights and franchises which said Railroad Company shall hereafter in any way acquire to or in or for use upon or for the business of said Railroad, branches, or appurtenances, and shall, and will, also make, do, seal, execute, acknowledge and deliver, or cause to be made, done, sealed, executed, acknowledged and delivered, all and every such further acts, matters, things, deeds, conveyances and assurances in law, for the better assuring, conveying and confirming unto said Trustee, its successors and assigns, all and singular the hereditaments and premises, estates and property hereby conveyed or intended so to be, or which are hereby covenanted and agreed to be hereafter conveyed to said Trustee, its successors or assigns, as by such Trustee, or its counsel, learned in the law, shall or may be desired or required for the better effectuating and carrying out of the provisions, objects and purposes of this mortgage and securing the payment of the principal and interest of the bonds intended to be hereby secured, all of which said estates

shall be held by said Trustee in, under and upon the several and respective trustees and for the uses and purposes and subject to the powers and authorities herein declared and expressed.

Tenth. It shall be no part of the duty of the Trustee to file or record this indenture as a mortgage or conveyance of real estate or as a chattel mortgage, or to renew such mortgage or to procure any further order, or additional instrument of further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or for giving notice of the existence of such lien or for extending or supplementing the same; nor shall it be any part of said Trustee's duty to effect insurance against fire or other damage on any part of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made.

In case at any time it shall be necessary and proper for the Trustee to make an investigation respecting any facts preparatory to taking or not taking any action, or doing or not doing anything as such Trustee, the ceretificate of the Railroad Company, under its corporate seal, attested by its President or Vice-President and the affidavit of one or more of its Directors, shall be conclusive evidence of such fact to protect the Trustee in any action it may or may not take by reason of the supposed existence of such fact.

81 Eleventh. It is expressly stipulated and agreed, and made an essential consideration by and between the parties hereto, representing, respectively, the stockholders of this company, party of the first part, and the holders of bonds to be issued and secured by this indenture, that, in no event shall the stockholders of the party of the first part, or any of them, be or be held personally liable for the payment of the principal or interest on said bonds under any law now in force or that may hereafter be enacted, such individual liability on the part of the stockholders of the party of the first part, made by statute or otherwise, being by the acceptance of the bonds secured by this indenture, by the holders of such bonds, expressly waived.

Provided, always, that if the said The Columbus, Sandusky and Hocking Railroad Company, its successors or assigns, shall well and truly pay or cause to be paid unto the several persons, bodies politic or corporate, who shall become holders of the bonds and coupons intended to be hereby secured, the several sums of money expressed therein, on the day and year hereinbefore mentioned for payment thereof, together with the inter-

est on the same, according to the provisions of said bonds and coupons, or in accordance with the provisions hereof, without fraud or further delay, then and from henceforth, this indenture, and the estate hereby conveyed, or intended so to be, and the said bonds and coupons, shall become void and of no effect, anything hereinbefore contained to the contrary thereof notwithstanding.

In testimony whereof, the party of the first part has caused its corporate seal to be hereto affixed, and these presents to be signed by its President and duly attested by its Secretary; and the party of the second part, in token of its acceptance, has caused its corporate seal to be hereto affixed, and these presents to be signed by its President and duly attested by its Secretary, on this, the 11th day of November, A. D. 1895.

THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD CO.,
By N. MONSARRAT, *President.*

Attest:
H. D. TURNEY, *Secretary.*

Signed, sealed and acknowledged in the presence of
W. E. GUERIN, [SEAL.]
F. J. PICARD.

82 STATE OF NEW YORK, } ss:
*New York County,* }

The undersigned, The Metropolitan Trust Company of the city of New York, hereby accepts and agrees to act as Trustee under the trust created in the foregoing mortgage or deed of trust.

THE METROPOLITAN TRUST CO. OF THE CITY OF NEW YORK,
By CHAS. M. JESUP, *2d Vice-President.*

Attest:
BEVERLY CHEW, *Secretary.*

Signed, sealed and acknowledged in the presence of
RAYMOND J. CHATRY, [SEAL.]
THEO. F. BALDWIN.

STATE OF OHIO, } ss:
*Franklin County,* }

Be it remembered that on this, the 11th day of November, A. D. 1895, before me, a notary public in and for said county,

personally came N. Monsarrat, President of the Columbus, Sanduksy and Hocking Railroad Company, and H. D. Turney, Secretary of said company, respectively, and personally known to me to be the persons whose names are subscribed to the foregoing instrument as President and Secretary of said company, and severally acknowledged the same as and for the voluntary act and deed of said The Columbus, Sandusky and Hocking Railroad Company, by them severally and voluntarily done and executed for the purposes therein set forth, and the said President and Secretary acknowledged that they were well acquainted with the corporate seal of said Railroad Company, and had the same in their custody, and attached said corporate seal of said Railroad Company to said instrument in my presence; and said President and Secretary did further acknowledge that the seal of said Railroad Company and the signature of said Railroad Company was so affixed by the order of the Board of Directors of said Railroad Company, and that said President and Secretary each represented the office in which they claimed to act, having before that time been duly elected as such President and Secretary by the Board of Directors of said Railroad Company, and were still acting in such capacity; and said N. Monsarrat and H. D. Turney further acknowledged before me that the said signing, sealing and execution of the foregoing instrument was their and each of their free act and deed, for the purposes therein set forth.

In testimony whereof, I have hereunto set my hand
83 and affixed my notarial seal, this the day and year last above mentioned.

[SEAL.] E. L. McCUNE,
*Notary Public in and for Franklin County, Ohio.*

STATE OF OHIO, }
*Franklin County,* } *ss:*

I, Charles F. Galloway, clerk of the Court of Common Pleas within and for the county aforesaid, do hereby certify that , whose name is subscribed to the foregoing acknowledgment as a notary public, was, at the date thereof, a notary public in and for said county, duly commissioned and qualified, and authorized as such to take said acknowledgment; and further, that I am well acquainted with his handwriting, and believe that the signature to said acknowledgment is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Columbus, Ohio, this the day of November, A. D. 1895.

[SEAL.] ——— ———, *Clerk.*

STATE OF NEW YORK,
*City and County of New York,* } *ss*:

I do hereby certify that, on this, the 14th day of November, A. D. 1895, before me, Raymond J. Chatry, a notary public residing in the city and county of New York, personally appeared Chas. J. Jesup, the 2nd Vice-President of the Metropolitan Trust Company of the city of New York, and Beverly Chew, the Secretary of said Trust Company, to me, respectively, personally known to be such, and personally known to me to be the same persons whose names are subscribed to the foregoing instrument, who, being by me severally sworn, did depose and say that he, the said Chas. M. Jesup, resided in the city and county of New York, and that he, the said Beverly Chew, resided in the city and county of New York, and that he, the said Chas. M. Jesup, was 2nd Vice-President; and that he, the said Beverly Chew, was the Secretary of said Trust Company; that they severally knew the corporate seal of the said Trust Company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was affixed thereto by said Beverly Chew by authority of the Board of Trustees of said Trust Company; and the said Beverly Chew further deposed and said that he signed his name thereto by like authority as such Secretary and that he had signed, sealed and delivered the said instrument as his own free act and deed, and as the free
84 act and deed of the said Trust Company, for the uses and purposes therein expressed.

And I do hereby further certify that the foregoing instrument is executed in manner and form as required by the laws of the State of New York.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

[SEAL.] RAYMOND J. CHATRY,
*Notary Public, New York County, No.* ——.

STATE OF NEW YORK,
*City and County of New York,* } *ss*:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the Supreme Court, for the said city and county, the same being a court of record, do hereby certify that Raymond J. Chatry, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the city

and county of New York, dwelling in said city, commissioned and sworn, and duly authorized to take the same. And, further, that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, this the 14th day of November, A. D. 1895.

[SEAL.] HENRY D. PURROY, *Clerk.*

SANDUSKY, OHIO, *Dec. 10th, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to The Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date, at 1:15 o'clock p. m., and recorded in Vol. 42, pages ——— of the Record of Mortgages, in Erie County, State of Ohio.

[SEAL.] CHARLES G. SCHIPPEL, *Recorder.*

NORWALK, OHIO, *Dec. 10th, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to The Metro-
85 politan Trust Company of the city of New York, dated November 11th, 1905, for $10,000,000.00, on the above date at 4:30 o'clock p. m., and recorded in Vol. 40, page 531 of the Record of Mortgages, in Huron County, State of Ohio.

[SEAL.] Q. V. L. HOLIDAY, *Recorder.*

FREMONT, OHIO, *Dec. 10th, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to The Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 6:30 o'clock p. m., and recorded in Vol. 48, page 71 of the Record of Mortgages, in Sandusky County, State of Ohio.

[SEAL.] GEO. WEHRUNG, *Recorder.*

TIFFIN, OHIO, *Dec. 11th, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to the Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 9 o'clock a. m., and recorded in Vol. 74, page 65, of the Record of Mortgages, in Seneca County, State of Ohio.

[SEAL.] THOS. H. DROHEN, *Recorder.*

BUCYRUS, OHIO, *December 10, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to the Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 9:30 o'clock a. m., and recorded in Vol. 43, page 227, of the Record of Mortgages, in Crawford County, State of Ohio.

[SEAL.] PHILIP SCHAEFFER, *Recorder.*

MARION, OHIO, *Dec. 9th, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to the Metropolitan Trust Company of the city of New York, dated November 11th, 1859, for $10,000,000.00, on the above date at 6
86 o'clock p. m., and recorded in Vol. 38, page 84, of the Record of Mortgages, in Marion County, State of Ohio.

[SEAL.] W. E. WESTON, *Recorder.*

DELAWARE, OHIO, *Dec. 9th, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to the Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00 on the above date at 2:40 o'clock p. m., and recorded in Vol. 49, pages ———, of the Record of Mortgages, in Delaware County, State of Ohio.

[SEAL.] J. C. RODGERS, *Recorder.*

COLUMBUS, OHIO, *Dec. 11, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to the Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 4:30 o'clock p. m., and recorded in Vol. 211, page 177 of the Record of Mortgages, in Franklin County, State of Ohio.

[SEAL.] J. W. PETERS, *Recorder.*

LANCASTER, OHIO, *Dec. 14, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to The Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 9:30 o'clock a. m., and recorded in Vol. 42, page 483, of the Record of Mortgages, in Fairfield County, State of Ohio.

[SEAL.] F. W. WRIGHT, *Recorder.*

NEW LEXINGTON, OHIO, *Dec. 7, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to the Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 9:30 o'clock a. m., and recorded in Vol. 2, page 124, of the Record of
87 Mortgages, in Perry County, State of Ohio.

[SEAL.] I. W. MINOR, *Recorder.*

ZANESVILLE, OHIO, *December 7, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to the Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 1:30 o'clock p. m., and recorded in Vol. 82, page 249, of the Board of Mortgages, in Muskingum County, State of Ohio.

[SEAL.] F. H. KING, *Recorder.*

MCCONNELLSVILLE, OHIO, *Dec. 16, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to the Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 5:30 o'clock p. m., and recorded in Vol. Y, page 600 of the Record of Mortgages, in Morgan County, State of Ohio.

[SEAL.] GEO. G. KING, *Recorder.*

LOGAN, OHIO, *Dec. 13th, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to The Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 7:30 o'clock p. m., and recorded in Vol. 18, page 366 of the Record of Mortgages, in Hocking County, State of Ohio.

[SEAL.] D. M. O'HARE, *Recorder.*

ATHENS, OHIO, *Dec. 13, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to The Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 1:30 o'clock p. m., and recorded in Vol. 30, page 48, of the Record of
88 Mortgages, in Athens County, State of Ohio.

[SEAL.] C. L. BEAN, *Recorder.*

MARIETTA, OHIO, *Dec. 17, 1895.*

Received for record, general mortgage from The Columbus, Sandusky and Hocking Railroad Company to The Metropolitan Trust Company of the city of New York, dated November 11th, 1895, for $10,000,000.00, on the above date at 12 o'clock m., and recorded in Vol. 43, page 597, of the Record of Mortgages, in Washington County, State of Ohio.

[SEAL.] J. W. ATHEY, *Recorder.*

And afterwards, to wit, on the 27th day of October, A. D. 1898, an entry was made upon the Journal of said court, in the above entitled cause, which said entry is clothed in the words and figures following, to wit:

Entry C—520.

MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY, Defendant. } 816.

This day came Winfield S. Gregg and by leave of court filed an amendment to his intervening petition heretofore filed herein.

And afterwards, to wit, on the 27th day of October, A. D. 1898, came Winfield S. Gregg, by his attorneys, and by leave of court filed in the clerk's office of said court his certain amendment to intervening petition in this case, which said amendment is clothed in the words and figures following, to wit:

89 *Amendment to Intervening Petition of Winfield S. Gregg.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY, Defendant.

Amendment to the Intervening Petition of Winfield S. Gregg. Gregg.

The intervening petitioner, Winfield S. Gregg, files this his

amendment to the intervening petition in the above entitled cause, as follows:

1st. By inserting in the second paragraph after the words "still remains due and unpaid," the following words, to wit: "and is a claim growing out of the operation of said railroad, a necessary operating expense and for materials furnished and used to keep said railroad and preserve said property as a going concern."

2nd. By inserting in the third paragraph, page five, after words "necessarily incurred and growing out of the operation and maintenance of the said railroad by the said defendant company and said receiver," the words "and preserving and using the same as a going concern."

3rd. By inserting in the third paragraph, page six, after the words "of said railroad company by him as such receiver," the words "and preserving and using the same as a going concern."

4th. By inserting in the fourth paragraph, page six, after the words "in payment for certain materials and supplies," the words "necessary for the operation and maintenance of said railroad and for preserving the same as a going concern and for such purpose used by and."

C. T. MARSHALL,
CLEVELAND & BOWLER,
*Solicitors for Complainant.*

90 UNITED STATES OF AMERICA,
*Southern District of Ohio, Muskingum County,* } *ss:*

Winfield S. Gregg, being first duly sworn, deposes and says, that he is the petitioner above named, that he has read the foregoing amendment to his intervening petition heretofore filed, herein, and knows the contents thereof; that as to the facts stated therein on knowledge same are true, and as to those stated on information and belief, he believes the same to be true; and further deponent saith not.

W. S. GREGG.

Sworn to before me and subscribed in my presence, this 24th day of October, 1898.

[SEAL.]

C. C. LEMERT,
*Notary Public in and for Muskingum County, O.*

And afterwards, to wit, on the 26th day of November, A. D. 1898, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

## Entry C—551.

United States Circuit Court, Southern District of Ohio, Eastern Division.

MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, Defendant.
} Order.

This twelfth day of November this cause came on to be heard upon the intervening petition of Winfield S. Gregg asking that the receiver be directed to issue receiver's certificates for the claims set out in said petition, &c., and it appearing to the court that said intervening petition was duly field herein, and that the said Mercantile Trust Company, Trustee, complainant, the Columbus, Sandusky & Hocking Railroad Company, defendant, and the said Samuel M. Felton, Receiver, were
91 duly served with copy of said intervening petition and with the order allowing the same to be filed, and it further appearing that on October 14th, 1898, the hearing of said intervening petition was, by order of court, set down to be heard on November 8th, 1898, at two thirty p. m., that thereafter, on October 21st, 1898, said hearing was, by order of Court, postponed until November 15th, 1898, at two thirty p. m., and that thereafter, by order of the court, on November 2nd, 1898, said hearing was again changed to November 12th, 1898, at eleven thirty a. m., and that due notices of the several orders fixing the time for the hearing of said intervening petition and of the changes made therein, were served on said complainant, defendant and said receiver, it is now ordered, adjudged and decreed that so much of said intervening petitioner's petition as seeks at this time to have his claim adjudged as a lien upon the Columbus, Sandusky & Hocking Railroad or the fund which may be created by the sale of said property, be continued for hearing until further order of the court, and that so much of the prayer of said petition as seeks to have receiver's certificates issued be denied. That this order is made without prejudice to any of the rights of the intervening petitioner to have his claim paid by the receiver out of net earnings which may come into his possession or out of the fund which may be created by the sale of the property, the sale of which is sought in this action, or may be sought in any action ancillary hereto or otherwise.

It is further ordered, adjudged and decreed that if the said complainant desires upon his said intervening petition to

bring said property to sale, that he be, and is hereby given permission to file an ancillary or dependent bill in this court making the parties to this cause, the receiver herein and any other lien-holders as he may be advised, parties thereto.

And all other matters on the intervening petition are continued until further order.

And afterwards, to wit, on the 24th day of December, A. D. 1898, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following to wit:

92 Entry D—20.

United States Circuit Court, Southern District of Ohio, Eastern Division.

MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, Defendant. } Order.

Upon motion of Winfield S. Gregg, intervening petitioner herein, it is ordered that the order heretofore made herein in which the court refused to issue receiver's certificates for the claim set up in said intervening petition be modified to this extent, that is to say, the refusal of said court to issue receiver's certificates for said claim shall be without prejudice to the right of said Winfield S. Gregg to set up and assert upon the distribution of the proceeds of the sale of the property sought to be foreclosed in this action, or in any action ancillary hereto, that the said claims set up in said intervening petition if adjudged to be a lien upon the property involved in said actions, prior to the mortgages sought to be foreclosed, are entitled to share in the fund created by the sale of said property equally with the receiver's certificates heretofore authorized to be, and which have been issued herein.

And afterwards, to wit, on the 27th day of December, A. D. 1898, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

## Entry D—21.

United States Circuit Court, S. D. O., E. D.

MERCANTILE TRUST COMPANY, A CORPORATION, &c., Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY, a corporation, *et al.*, Defendants.

93 This day this cause came on to be heard and the court of its own notice doth order, adjudge and decree that this said cause be and the same is hereby consolidated with cause No. 887 on the docket of this court, entitled the Metropolitan Trust Company, &c., a corporation &c., vs. The Columbus, Sandusky & Hocking Railroad Company, *et al.*, and that said consolidated causes proceed henceforth as one cause entitled, namely, The Metropolitan Trust Company, a corporation, &c., against The Columbus, Sandusky & Hocking Railroad Company, a corporation, *et al.*, No. 887.

And afterwards, to wit, on the 28th day of December, A. D. 1898, an entry was made upon the journal of said court in said cause which said entry is clothed in the words and figures following:

## Entry D—23.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, A corporation, &c.,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING R. R. Company, a corporation, &c., *et al.* } No. 816.

THE METROPOLITAN TRUST COMPANY, A corporation, &c.,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING R. R. Company, a corporation. } No. 887.

Consolidated causes.

This day came Winfield S. Gregg, intervening petitioner in the above entitled causes, heretofore consolidated, and moved

the court for an order, directing the parties complainant and defendant to said causes as consolidated, to plead, an-
94 swer or demur to the intervening petition of said Winfield S. Gregg, heretofore filed herein, by day certain to be fixed by the court, and that in default of such plea, answer or demurrer to said intervening petition that the allegations thereof may be taken as true, and thereupon,

The court finding said motion to be well taken, doth grant the same and doth order that the parties complainant and defendant herein, to wit: The Columbus, Sandusky & Hocking Railroad Company, a corporation, duly organized and existing under the laws of the State of Ohio, with its principal office in the city of Columbus, Ohio; S. M. Felton, receiver of the Columbus, Sandusky & Hocking Railroad Company aforesaid, of Cincinnati, Ohio; The Mercantile Trust Company, a corporation duly organized and existing under the laws of the State of New York, with its principal office in the City of New York; The Railroad Equipment Company, a corporation duly organized and existing under the laws of the State of New Jersey, with its principal office at Summit, New Jersey; The Pullman Palace Car Company, a corporation duly organized and existing under the laws of the State of Illinois, with its principal office in the city of Chicago; George W. Sinks, trustee, a citizen and resident of Columbus, Ohio; Jonas M. McCune, a citizen and resident of Columbus, Ohio; Jacob Klee, a citizen and resident of Delaware, Ohio; The Second National Bank of Columbus Ohio, organized and existing under the laws of the United States of America; The Second National Bank of Sandusky, Ohio, organized and existing under the laws of the United States of America; A. W. Prout, Sandusky, Ohio; Ed. H. Zuehorst, Sandusky, Ohio; Hewson L. Peeke, Sandusky, Ohio; Henry C. Strong, Sandusky, Ohio; Frank Stang, Sandusky, Ohio; James Flynn, Sandusky, Ohio; John W. Waginet, Sandusky, Ohio; D. L. C. Ransom, Sandusky, Ohio (guardian of Webster H. and Ross D. Ransom, minors); Rush R. Sloane, Sandusky, Ohio; F. G. Hallett, New York City, plead, answer or demur to the intervening petition of said Winfield S. Gregg, on or before the 7th day of February, 1899, and in default of said plea, answer or demurrer, that said intervening petition may be taken as confessed against said parties.

It is further ordered, that the said intervening petitioner, Winfield S. Gregg, cause to be mailed to each of the above named parties a copy of this order and that the mailing of the same shall be sufficient notice to said parties of the terms thereof.

95 And afterwards, to-wit: on the 28th day of December, A. D. 1898, there was filed in the clerk's office of said

court, a certain affidavit of Harlan Cleveland, in this cause, which said affidavit is clothed in the words and figures following, to-wit:

*Affidavit of Harlan Cleveland.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY, A COR., &C., Complainant, *vs.* THE COLUMBUS, SANDUSKY & HOCKING R. R. Company, a Cor., *et al.*, Defendants, } Affidavit. No. 887. Consolidated.

STATE OF OHIO, *Hamilton County*, } *ss*:

Harlan Cleveland being first duly sworn, deposes and says that he is one of the attorneys of Winfield S. Gregg, intervening petitioner herein, and that in pursuance of the order of the court as to service of the parties to the above entitled cause with notice of the time to plead, answer or demur to the intervening petition of Winfield S. Gregg, he caused to be mailed to each of said parties named in said order a copy thereof on the 28th day of December, 1898.

HARLAND CLEVELAND.

Sworn to before me and subscribed in my presence, this 28th day of December, 1898.

[SEAL.] C. E. SCHELL,
*Notary Public in and for Hamilton County, O.*

And afterwards, to-wit: on the 6th day of February, A. D. 1899, came the Trust Company, by its solicitors, and filed in the clerk's office of said court, its certain answer in this cause, which said answer is clothed in the words and figures following, to-wit:

*Answer of Trust Company to Petition of Winfield S. Gregg.*

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*against*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY, Defendant.

In the matter of the petition of Winfield S. Gregg.

The answer of the Mercantile Trust Company to the petition of Winfield S. Gregg, filed herein under order of the court, bearing date the 24th day of December, 1898, respectfully shows:

First: It admits that S. M. Felton was duly appointed and has qualified as Receiver of the Columbus, Sandusky & Hocking Railroad Company, and that under various orders of the court he was authorized to borrow and has borrowed money, and issued his certificates of indebtedness therefor, and begs leave to refer to the petition of said Receiver and orders of the court made thereon for the amount of said certificates authorized and the terms and purposes for which the same were issued; but has not knowledge or information sufficient to form a belief as to any of the other allegations contained in the first and second subdivisions of said petition, and therefore denies the same.

Second: It admits that the Columbus, Sandusky & Hocking Railroad has not yet been sold, but it has no knowledge or information sufficient to form a belief as to any of the other allegations contained in the third, fourth and fifth subdivisions of said petition, and therefore denies the same; and it denies specifically that the claims of the petitioner are a lien upon said Columbus, Sandusky & Hocking Railroad Company prior to the claim of this complainant as trustee, or that said claims are entitled to rank and be paid equally with the Receiver's certificates heretofore authorized and issued by said Receiver under orders of the court, or such claims as have heretofore been paid by said Receiver out of the proceeds of Receiver's certificates.

97 Wherefore, complainant prays that the petition of the petitioner may be dismissed with costs.

ALEXANDER & GREEN,
*Solicitors for Complainant,*
*No. 120 Broadway, New York, N. Y.*

*County of New York, ss*:

E. R. Adee, being first duly sworn, says that he is the Secretary of The Mercantile Trust Company, complainant herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

E. R. ADEE.

Sworn to before me this 4th day of February, 1899.
[SEAL.] P. DAMM,
*Notary Public, Kings County, N. Y.*

Cerificate filed in New York County.

And afterwards, to-wit: on the 8th day of February, A. D. 1898, came Samuel M. Felton, Receiver, by his solicitors, and filed in the clerk's office of said court his certain demurrer to intervening petition of Winfield S. Gregg, in this case, which said demurrer is clothed in the words and figures following, to-wit:

*Demurrer of Samuel M. Felton, Receiver.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST COMPANY,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company. } No. 887.

Demurrer of Samuel M. Felton, receiver, to the intervening petition of Winfield S. Gregg.

S. M. Felton, Receiver, demurs to the intervening petition of Winfield S. Gregg, upon the ground that the said intervening petition does not show that said Gregg is entitled to the relief prayed, or to any relief in equity against said S. M. Felton, Receiver.

LAWRENCE MAXWELL, JR.,
*Counsel for S. M. Felton, Receiver.*

98 And afterward, to-wit: on the 20th day of February, A. D. 1899, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to-wit:

## Entry D—79.

Circuit Court of the United States, for the Southern District of Ohio, Sixth Circuit.

| | |
|---|---|
| THE METROPOLITAN TRUST Company of New York, etc., Complainant, *vs.* THE COLUMBUS, SANDUSKY & Hocking Railroad Company, et al., Defendants. | No. 887. In Equity. Consolidated Cause. Order. |

Upon consideration of the pleadings in the above consolidated causes and of the order taking bill *pro confesso* against the defendant, The Columbus, Sandusky & Hocking Railroad Company, it is ordered that, except as to the claims of such creditors and claimants as are specifically made parties to this suit, this cause be referred to H. M. Butler, Master of this court, to take and state an account of the indebtedness of the receiver of the said Railroad Company and of the said Railroad Company itself as to all claims and demands for materials, supplies and labor and other services rendered to the said receiver or to the said Railroad Company within six months prior to the appointment of the said receiver and all traffic balances with other railroad companies accruing within six months prior thereto.

Ordered that all accounts and demands as aforesaid for which a preferential right may be claimed or asserted be produced and proved before the said master on or before the fifth day of April, 1899, under penalty of thereafter being disallowed within the discretion of the court. And it is further

Ordered that said H. M. Butler, master, forthwith give notice to all creditors and claimants as aforesaid to present their accounts and demands before the said master within the said specified time by publication to be made once a week for two successive weeks in one newspaper of general circulation, published with each of the cities of Columbus, Ohio, and New York City, New York, and that he give further notice
99 by mail of each and all creditors and claimants as aforesaid of whose names and addresses he may be apprised by the auditor of the receiver or otherwise.

And afterwards, to-wit, on the 23rd day of February, A. D. 1899, an entry was made upon the journal of said court, clothed in the words and figures following, to-wit:

Entry. Journal D, page 80.

Pursuant to an agreement in open court, it is ordered that the complainant, the Metropolitan Trust Company of the City of New York, be and it hereby is given leave to amend its bill of complaint herein as to the defendants, The Second National Bank of Sandusky and Ed. H. Zurhorst.

And now comes the said the Metropolitan Trust Company of the City of New York, and files an amendment to its bill pursuant hereto, and it is ordered that each of the defendants, The Second National Bank of Sandusky, and Ed. H. Zurhorst, file their answer, demurrer or plea thereto on or before the March Rule Day, and on failure so to do said bill may be taken *pro confesso* against them.

And afterwards, to-wit: on the 23rd day of February, A. D. 1899, the following amendment to bill was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

*Amendment to Bill.*

United States Circuit Court, Southenn District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, as Trustee, and in its individual right, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY, Samuel M. Felton, Receiver, *et al.*, Defendants.

*Amendment to bill.*

By leave of Court, your orator, the Metropolitan Trust Company of the City of New York, amends its bill of complaint as to the defendants, the Second National Bank, of Sandusky, and Ed. H. Zurhorst, as follows:

First. By striking out the whole of paragraph XVII in so far as it relates to the said two defendants, and inserting in the stead thereof the following, so that the said paragraph XVII shall, as regards these two defendants, read as follows:

That portion of the railroad of the defendant, the C., S. & H. R. R. Co., mentioned in the bill and described in the mortgage attached to the bill, which extends from the City of Sandusky to the City of Columbus, was originally constructed and owned by the Sandusky & Columbus Short Line Ry. Co., a corporation duly organized under the laws of the State of Ohio, for

the purpose of constructing, owning and operating a line of railway extending from the City of Sandusky to the City of Columbus.

On or about July 28, 1893, said Sandusky & Columbus Short Line Ry. Co. purchased from the Lake Erie Construction Co., a corporation organized and existing under the laws of Ohio, and paid for the following real estate; known as parts of outlots numbered 24, 32 and 33, and bounded and described as follows: Beginning at the northeast corner of outlots number 24 of Darling's survey of a 364 acre tract of the Isaac Mills' estate west of the City of Sandusky, Portland township, Erie County, State of Ohio; thence S. 2 deg. 30' E. 515.5 feet to a point on the N. right of way line of the Lake Shore and Michigan Southern Railway Company right of way; thence N. 83 degrees 08' W., 202.4 feet along said right of way line to a street; thence N. 2 deg. 30' W., 413.2 feet to S. right of way line of the Cleveland, Cincinnati, Chicago and St. Louis Railway right of way; thence N., 52 deg. 58' E.' 485 feet to a point on dividing line between outlots numbers 32 and 25 of said tract; thence S., 2 deg. 30' E., 294 feet along said dividing line to the common corner of outlots 32, 25, 24 and 33 of said tract; thence S., 89 deg. 13' E., 395.2 feet to point of beginning and containing (9.96) nine and ninety-six one-hundredths acres more or less. Being the same real estate conveyed to the defendant Ed. H. Zurhorst by the deed of George Marshall and Elizabeth, his wife, filed on record on November 7, 1892, with the recorder of Erie County, Ohio.

Also the following real estate in the City of San-
101 dusky, Erie County, Ohio; situate in the City of Sandusky, County of Erie and State of Ohio, and known as parts of out-lots Nos. 25 and 9, beginning at the common corner of outlots Nos. 24, 25, 32 and 33 of Darling's survey of a 364 acre tract of Isaac Mills' estate west of the City of Sandusky in Portland township, Erie County, State of Ohio, and extending thence south 89 deg., 13' E., 395.2 feet to a street; thence N., 2 deg. 30 W., 251.8 feet along west side of said street; thence S., 57 deg., 20' W., 485.2 feet to point of beginning and containing (1.14) one and fourteen-hundredths acres; also, beginning at a point S., 89 deg. 31.' E., 345 feet from S. W. corner of outlot No. 9; thence N. 52 deg. 04' E., 364.9 feet to the middle of Mills Creek; thence at right angles S., 37 deg. 56' E., 68 feet; thence at right angles S. 52 deg. 04' W., 262.6 feet; thence N., 89 deg. 31' W., to point of beginning and containing (63) sixty-three hundredths acres, be the same more or less, but subject to all legal highways; and took possession thereof as part of its said line of railway.

Prior thereto, to-wit, on or about October 31, 1891, said Sandusky & Columbus Short Line Ry. Co. duly executed, delivered and recorded a certain mortgage deed to the Metropolitan Trust Co., of the City of New York, a corporation organized and existing under the laws of the State of New York, upon said railroad of said company, with its lands, tenements, hereditaments, rights of way, fixtures, buildings, and all other property, franchises, privileges, rights, interests, rents, tolls, incomes, revenues, resources, reservations, investments, leases, contracts, assets and estate, legal and equitable, then owned by said Railroad Company or thereafter to be acquired by it, and pertaining to said line of railroad, to secure the first mortgage bonds of said Railway Company to the amount of $3,000,000, being three thousand bonds for $1,000 each, dated November 1, 1891, and payable on the first day of November, 1941, with interest at the rate of five per cent. per annum. Said S. & C. S. L. Ry. Co. duly sold and issued said 3,000 bonds prior to said July 28, 1893, and said mortgage became a valid lien upon said line of railway, including the real estate hereinbefore described and the first and best lien thereon.

At the time of the purchase of said real estate by said Sandusky & Columbus Short Line Ry. Co. from said Lake Erie Construction Co., the title thereto was in the name of the defendant, Ed. H. Zurhorst, who held the same as trustee for said Lake Erie Construction Co., and from and after
102 said purchase by said Sandusky & Columbus Short Line Ry. Co. said Zurhorst held the same as trustee for said Railway Co. He had no other right, title, interest or estate therein.

On or about July 21, 1894, said Sandusky & Columbus Short Line Ry. Co. was duly consolidated under the laws of the State of Ohio with the Columbus, Shawnee & Hocking Ry. Co., a corporation organized under the laws of the State of Ohio, into Columbus, Sandusky & Hocking Railway Co., a corporation under the laws of the State of Ohio, and said Columbus, Sandusky & Hocking Railway Co., by virtue of said consolidation, became the owner of said line of railway between Columbus and Sandusky; including the real estate hereinbefore described, and of all the right, title, interest and estate of said Sandusky & Columbus Short Line Ry. Co., therein at the time of said consolidation.

On or about July 5, 1895, said Metropolitan Trust Co. of the City of New York, trustee, duly commenced its action in the Court of Common Pleas of Crawford County, Ohio, against said Columbus, Sandusky & Hocking Ry. Co. to foreclose said $3,000,000 mortgage of said Sandusky & Columbus Short Line

Ry. Co. Said court of Common Pleas of Crawford County, Ohio, at the April term thereof, 1895, entered a final decree in said foreclosure suit, foreclosing said mortgage and ordering the sale of said railway, including the real estate hereinbefore described, for the payment of said mortgage and bonds, and the same was, by the orders of said court, duly sold and conveyed by the deed of Smith W. Bennett, Special Master Commissioner of said court, dated November 4, 1895, to Geo. W. Sinks and Daniel B. Hatch, who subsequently, by their deed of the same date, to-wit, November 4, 1895, conveyed the same to the defendant the C., S. & H. R. R. Co., which company thereupon became, and at the time of the execution, delivery and record of the mortgage mentioned in the bill of complaint was, the owner of said line of railway, including said real estate hereinbefore specifically described, and all the rights, title, interest and estate in said real estate which said Sandusky & Columbus Short Line Ry. Co. acquired by virtue of its said purchase thereof from said Lake Erie Construction Co.

Each of the said companies, the said Sandusky & Columbus Short Line Ry. Co., the Columbus, Sandusky & Hocking Railway Co., and the Columbus, Sandusky & Hocking Railroad Co., was during the period of its ownership of said property, in this paragraph specifically described, always in the actual
103 possession thereof, except when, if ever, a receiver of the property of the said company was in possession thereof.

Long after said Sandusky & Columbus Short Line Ry. Co. had purchased said real estate from Lake Erie Construction Co. and had taken possession thereof, said Ed. H. Zurhorst executed a mortgage on a portion thereof to the defendant A. W. Prout, to secure a note of the Lake Erie Construction Co., to the order of said A. W. Prout, dated October 4th, 1893, for the sum of $5,379.90 payable 90 days after date. Said mortgage was delivered for record to the recorder of Erie county on or about Feb. 13, 1894, at 9:50 o'clock a. m., and was by him recorded in mortgage book No. 39, page 114, of the records of said county. The defendant, the Second National Bank of Sandusky, claims to be the owner of said mortgage and that the same is a lien upon said real estate prior to the lien of the mortgage of the defendant, the C., S. & H. R. R. C-. set up in the bill. But the plaintiff says that said Zurhorst at the time of the execution of said mortgage was not the owner of said real estate and had no right, title, interest or estate therein, except as trustee for said Sandusky & Columbus Short Line Ry. Co.; that he executed said mortgage without the authority of the said S. & C. Short Line Ry. Co., and that the same is not a valid lien upon said real estate and was taken by said Prout

and by said Second National Bank without consideration, and with notice and knowledge of the fact that said Sandusky & Columbus Short Line Ry. Co. was the owner of said real estate, and that it was at the time in the possession thereof.

On or about July 12, 1897, after the appointment of Samuel M. Felton, as receiver herein, and after he had taken possession of said real estate as such receiver said Zurhorst executed another mortgage to said Second National Bank, upon said real estate, which has been recorded by the recorder of Erie county, Ohio, in Vol. 44, pages 357, 358 of the mortgage records of said county. The defendant, The Second National Bank of Sandusky, Ohio, claims that said mortgage is a lien upon said real estate, prior to the lien of the mortgage of the defendant the C., S. & H. R. R. Co. set up in the bill. But the plaintiff says that said Zurhorst at the time of the execution of said mortgage was not the owner of said real estate and had no right, title, interest or estate therein, except as trustee for the defendant, the C., S. & H. R. R. Co., and he executed said mortgage without authority of said C. S. & H. R. R. Co., and
104 that the same is not a valid lien upon said real estate and that said mortgage was taken by said Second National Bank of Sandusky, with notice and knowledge of the fact that said C., S. & H. R. R. Co. was the owner of said real estate, and that said real estate at the time of the execution of said mortgage was in the possession of Samuel M. Felton, receiver of this court.

In August, 1897, the defendant, the Second National Bank, of Sandusky, Ohio, recovered a judgment in the Court of Common Pleas of Cuyohoga County, Ohio, against the defendant E. H. Zurhorst, and caused execution upon said judgment to be levied upon said real estate. He claims that said execution is a lien upon said real estate. Plaintiff says that said levy of execution is null and void, and that said Second National Bank, of Sandusky, has no lien upon said real estate.

Second: By adding to the prayer of the said bill of complaint a prayer as follows:

(12) That the lien of the plaintiff's mortgage may be decreed to be prior in right to the claim of each and all of said defendants, the Second National Bank, of Sandusky, and Ed. H. Zurhorst on the real estate hereinbefore in paragraph XVII described, and that the same shall be sold free from any claim, right, title, interest or estate of any said defendants in said real estate.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, *Complainant.*

By PARSONS, SHEPARD & OGDEN, *Its Solicitors,*
*111 Broadway, New York, N. Y.*

105 And afterwards to wit, on the 9th day of March, A. D. 1899, the following amendment to bill was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Amendment to Bill.*

Circuit Court of the United States, for the Southern District of Ohio, Sixth Circuit.

MERCANTILE TRUST CO., *against* THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY, *et al.* } 837.

METROPOLITAN TRUST COMPANY, *against* THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY, *et al.*

By leave of court your orator the Metropolitan Trust Company, in order that the bill of complaint heretofore filed may be responsive to the matters set up in the answer of the defendant the Railroad Equipment Company amends the same as follows:

First, by inserting in the 11th line of the 14th paragraph of said bill of complaint after the words "the defendant Railroad Company;" the words "that by the contracts of sale, or as it is styled by the said Railroad Equipment Company, of lease, to the Shawnee and Muskingum River Railway Company the Columbus, Shawnee and Muskingum River Railway Company, and their respective successors in interest, interest upon the deferred payments under said contracts, or as styled by the said Equipment Company lease warrants was required to be paid at a rate in excess of 8 per cent. per annum, which said interest in excess of 6 per cent. per annum should be credited, as required by the Ohio statutes in that case made and provided, as partial payments upon the amount due by the Railway Companies as aforesaid to the said Equipment Company; that said agreements were not registered or recorded as required by the laws of Ohio."

Second. And by inserting in the thirteenth line of
106 the said paragraph in lieu of the word "thereto" the words "to the said equipment and is superior in all respects to the lien, if any, of the said equipment Company upon the said rolling stock by reason of any of the aforesaid contracts or agreements."

Third. And by inserting in the 15th line of the said paragraph after the words "unpaid for" the words "or that the lien of the said Equipment Company under any of its said contracts or agreements is superior to that of your orator," so that said paragraph as amended will read as follows:

"XIV. The defendant, the Railroad Equipment Company claims to have a lien upon and a right to take possession of certain rolling stock consisting of cars, coaches and locomotives, to which the said Equipment Company claims to own the legal title, but your orator is informed and believes and so alleges that all of said equipment has been fully paid for, that the lien of the Railroad Equipment Company, if it ever existed thereupon has been discharged by virtue of the said payment, the title hereto, both legal and equitable, has passed to the defendant Railroad Company, that by the contracts of sale, or, as it is styled by the said Railroad Equipment Company, of lease, to the Shawnee and Muskingum River Railway Company, the Columbus, Shawnee & Hocking Railway Company and their respective successors in interest, interest upon the deferred payments under said contracts, or as styled by the said Equipment Company, lease warrants, was required to be paid at a rate in excess of eig*th* per cent. per annum, which said interest in excess of six per cent. per annum should be credited as required by the Ohio statutes in that case made and provided, as partial payments upon the amount due by the Railway Companies as aforesaid to the said Equipment Company; that said agreements were not registered or recorded as required by the laws of Ohio; and that the lien of your orator's said deed of trust of November 11th, 1895, has attached to the said equipment and is superior in all respects to the lien, if any, of the said Equipment Company upon the said rolling stock by reason of any of the aforesaid contracts or agreements.

"But in the event that it be determined that any portion of said rolling stock still remains unpaid for or that the lien of the said Equipment Company under any of its said contracts or agreements is superior to that of your orator, then your orator alleges that under the laws of Ohio, the said Railroad Equipment Company may not possess itself of the said rolling stock without having first made a tender to the defend-
107 ant Railroad Company or its successors in interest of not less than fifty per cent. of the cash payments theretofore received by the said Equipment Company upon the said rolling stock." Feb. 2, '99.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, *Complainant.*

By PARSONS, SHEPARD & OGDEN, *Its Solicitors,*
*111 Broadway, New York, N. Y.*

And afterwards to wit, on the 24th day of March, A. D. 1899, an entry was made upon the journal of said court, clothed in the words and figures, following, to wit:

Entry. Journal D, Page 132.

*Modification of Order of Reference.*

THE METROPOLITAN TRUST COMPANY, OF NEW YORK,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, *et al.* } No. 887.

Upon further consideration of the order entered herein, on February 20, 1899, it is ordered that H. M. Butler, Master, do not take or state any account of the indebtedness of S. M. Felton, as receiver, or call for the claims of any creditors of the receiver, and said order of February 20th, 1899, is hereby modified accordingly.

And afterwards to wit, on the 29th day of May, A. D. 1899, there was filed in the clerk's office of said court a certain deposition of W. H. Mautz, in this case, which said deposition is clothed in the word and figures following, to wit:

108 *Deposition of W. H. Mautz.*

Notice to take depositions.

STATE OF OHIO, *Hamilton County,* } *ss*:

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, a corp. &c., & The Mercantile Trust Co., of New York, a corp. &c., Plaintiffs,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING R. R. CO., & CORP., &c., *et al.*, Defendants.

Case No. 887, pending in the U. S. circuit court, southern district of Ohio, eastern division.

The above named plaintiffs will take notice that on Wednesday, the 17th day of May, A. D. 1899, Winfield S. Gregg, will take the deposition of W. H. Mautz, to be used as evidence in the trial of the above cause in behalf of the said Winfield S. Gregg, upon the intervening petition filed by him in said

cause, at the office of Messrs. Preston, Carr & Gilman, Pioneer Building in the City of Seattle, in the county of King, in the State of Washington, between the hours of eight o'clock a. m. and six o'clock p. m. of said day and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

CLEVELAND & BOWLER,
*Attorneys for Winfield S. Gregg.*

Done this 26th day of April, A. D. 1899.

——— ———,
*Attorneys for the Mercantile Trust Company of New York.*

MORRISON R. WAITE,
*Attorney for the Metropolitan Trust Company of the City of New York.*

L. MAXWELL, JR.,
*For Mercantile Trust Co.*

Deposition of a witness, taken before me, W. A. Keene, a notary public, in and for the state of Washington, residing at Seattle, King county, state of Washington, pursuant to to the annexed notice, and at the time and place therein specified, to be read in evidence on behalf of the intervening petitioner, Winfield S. Gregg, in an action pending
109 in the Circuit Court of the United States, Southern District of Ohio, Eastern Division, No. 887, in which Metropolitan Trust Company of the city of New York, a corporation, &c., and the Mercantile Trust Company, of New York, a corporation, &c., are plaintiffs, and the Columbus, Sandusky & Hocking R. R. Co., a corporation, &c., *et al.*, are defendants, and W. S. Gregg, intervenor; George A. Hurd, Esq., being present on behalf of plaintiff, Metropolitan Trust Company, and Harold Preston, Esq., on behalf of the intervening petitioner, Winfield S. Gregg.

W. H. MAUTZ, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

By Mr. PRESTON:

Q. State your full name?
A. William Henry Mautz.
Q. Where do you reside at present?
A. I am out at Camp Leary now. My home is in Ohio.
Q. Where is Camp Leary from here?

A. Well, it is four miles from Black Diamond. It is about thirty miles from here.

Q. Do you know the intervenor, Winfield S. Gregg?

A. Yes, sir.

Q. Were you ever in the employ of the Columbus, Sandusky & Hocking Railroad Company?

A. Yes, sir.

Q. In what capacity?

A. As roadmaster.

Q. How long a period?

A. From 1886 up to last December, a year ago.

Q. December, 1897?

A. Yes, December, 1897; December 13th, 1897.

Q. I judge, then, that you were in the employ of that company at the time the receiver was appointed

A. Yes, sir.

Q. And were under the receiver's employ for some time after that?

A. Yes, sir.

Q. What were your duties as roadmaster?

A. Well, I had charge of the track—that is, the road department and water stations.

Q. Is there a branch of that road?

A. Yes, there were several of them.

Q. Did you have charge of the branches also?

A. Yes, sir.

Q. In the same capacity?

110 A. Yes, sir.

Q. Do you know anything about the furnishing of the ties to that railroad company by the intervenor, Mr. Gregg, during the month of May and on June first, second and third, of the year 1897?

A. Yes, sir; I inspected ties and had them distributed along the road.

Q. Did you have the quantity of ties delivered during the period I have stated, that is to say, in May, 1897, and June 1st, 2nd and 3rd, 1897?

A. Well, I could not give you the account of that; it has been so long ago; I have not given it any attention but there were more ties furnished in that estimate than there was previous to that time; I would claim somewhere near five thousand. I think there was about that. Of course I had all the information, but since I have been off the road I have not paid any attention to it. I think I furnished Mr. Gregg a statement —well, he had a statement.

Q. About how many miles of road had the company?

A. Well, they figure 260 miles all told, but they had not

quite that much of their own track, I do not think. I do not believe I can give all the branches. The Sandusky Division was 111 miles long; and Columbus to Shawnee 89; Griggs to Glouster it was either eight or nine, I am not positive; from Sayer to Shawnee Junction is about 11, I would judge, if I remember right. From Fultonham to Zanesville was 11 miles and from Muskingum to Campbellville was about 10 or 11 miles and the Redfield Branch was a mile. Then there was sixty some miles of side track, outside of the main track. That does not vary much either way.

Q. How many rails were there to the mile?

A. Well, we had mostly thirty foot rails; once in a while there was a 26 or 26 but 76 rails to the mile.

Q. How many ties to the rail?

A. We used 16 to 17, sometimes we had a small tie where we used 17, but the standard tie, our 7x9 ties, we used 16.

Q. Now, when that road was laid with new ties, how many new ties per rail each year was necessary to keep the track in good repair?

A. Well, we figure the life of the tie at 8 years; we would take about two to the rail, when we built the Sandusky Division there were a good many hemlocks and tamarack ties used in there.

Q. What are they, a poor tie?

111 A. Yes, they are a poor tie; the hemlock tie will last —the limit of that would be about five years.

Q. Is that what they call the shortline division?

A. Yes, sir.

Q. Now, in the summer of 1897, what was the condition of the road bed, in respect to the sufficiency of the ties?

A. Well, I would say it was just about as bad as could be to run over.

Q. Was there any difference between the road generally and what is called the short line division in that respect?

A. Yes, the short line division where this tamarack and hemlock ties were laid, they were all gone. Those had rotted out at that time, and it took an extra quantity of ties for renewals.

Q. Do you know how many ties were put in the roadbed in the year 1892?

A. No, I could not tell you, but I have had memorandas of them, but I could not tell you.

Q. Do you know how many in the year 1893?

A. I could not answer that.

Q. Well, during the years 1892, 1893, 1894, 1895 and 1896, how did the amount of new ties furnished each year compare with the amount required to keep the road up in good condition as to ties?

A. Well, we never got, not during those years, over two-thirds of the ties that we had made requisitions for.

Q. How did your requisitions compare with the amount actually needed?

A. Well, I always got, the requisition of the sections. Take it along in the fall we asked the section men to make a requisition for the number of ties they would need during the following year, and they came in and I would make out my requisition from their requisitions, and I think always cut their requisitions to kind of suit the pocketbook of the road, as you would term it.

Q. Well, were your requisitions during any of these years in excess of the actual necessities of the road?

A. No, sir.

Q. Were they less than actually necessary?

A. Yes, I would say they were.

Q. Do you know how many ties the section men made requisitions for, for the year 1897?

A. It was a little over a hundred thousand.

Q. Did you cut down your requisitions to the com-
112 pany?

A. Yes, something like 15,000.

Q. What was the amount of your requisition for ties to the company for that year?

A. A little over 85,000 for that year if I remember right.

Q. Do you know how many the company contracted with Mr. Gregg for the year 1897?

A. I believe it was somewhere about thirty thousand, if I am not mistaken.

Q. Were the ties that you have spoken of Mr. Gregg furnished in May and June, 1897, ties furnished under the requisition for 1897, concerning which you have spoken?

A. Yes, sir.

Q. If no ties had been furnished or if the ties furnished by Mr. Gregg in May and June, 1897, had not been furnished, what would have been the result as to the condition of the track as to safety?

A. Well, it was not safe as it was. I went and picked up one car of ties; I stayed out all night just to get one car of ties to patch up some bad places of track I was afraid of and expected a wreck at any time.

Q. Now, was this condition of danger common throughout the line, or did it apply to some parts?

A. Well, there were certain portions of the road that had been skipped from year to year, we always left the best part; probably before you would get to that we would fix the worst places and then we would always leave some place that we felt we might probably carry along by watching close. Now, those

were the places that we always had to start in and patch up. We could never start in as railroads usually do in the spring of the year at the end of the section and go as far as they expected to put in new ties, and then next year start at that point and go on over the balance of the section; we had to patch along and put in a tie here and there and probably leave two or three bad ties on each side of it to hold the track and put in a new one to bolt it to.

Q. What have you to say about the condition of the road generally in 1896, or rather when these ties were furnished in 1897, as to these ties being necessary to put the road in a safe condition for travel and use and operation?

A. Well, it was very necessary to have these ties. As I heard the receiver say on the car coming from Sandusky to Columbus, shortly after he was appointed, we needed 100,000 ties.

113 Objected to by counsel for plaintiff as hearsay and incompetent, irrelevant and immaterial.

A. (Continuing.) The receiver stated on the car com*ing* down that day, soon after he was appointed, that we needed 100,000 ties on the road as soon as we could get them.

Q. Now, at the time these ties were furnished and before they were put in place, was it safe to run heavy trains over the road?

A. Well, they run them but I did not consider it safe, as I told the president, we were liable to have a wreck at any time.

Q. After the receiver was appointd, were there any ties bought by the receiver, in the fall of 1897?

A. They bought every tie they could find anywhere along the road.

Q. Were the total purchase large in quantity?

A. No, sir; they could not get them.

Q. Do you know how many ties they did buy in the fall of 1897, in round numbers?

A. I do not think it went over 47,000 to 50,000, something along there. I am not positive about that. I do not think it was over 55,000 all told.

Q. What time of year, what season of the year, was it that the ties were uniformly put in place on the road?

A. Well, we put them in whenever we could get them. We put them in in freezing weather. But usually start in the spring and have your ties all in by July and August or middle of August, all ties ought to be in the railroad.

Q. What is the best month in the year to put in ties?

A. Starting in April and May and June.

Q. What month in the year are the ties themselves in the best condition to be bought and used?

A. Ties should be bought and cut in the winter before the sap comes up in the spring.

Q. During the years 1892, 1893, 1894, 1895 and 1896, what proportion of ties needed to properly equip the track were actually furnished?

A. Well, I judge in 1892 and 1893 we had about all the ties that were actually needed in those two years; that was during the time that we were doing some construction work; and at that time the shortline division was not completed, they were building it at that time.

Q. Well, take the years 1894, 1895 and 1896, how was it as to the amount of ties furnished?

A. Well, I would say in 1895 and 1896 we were short one-third our requisition.

114 Q. What condition in the spring and summer of 1897 was the rolling stock of the road?

A. Well their cars were in very bad shape, and their engines; that was about the time their engines were in bad shape, about 1897 and 1898 their engines were bad.

Q. Now, if these ties that were furnished in May and the first three days in June, 1897, by Gregg, had not been furnished, could the road have been safely operated?

A. No, sir.

Cross-examination.

By Mr. HURD:

Q. Mr. Mautz, were any other ties purchased by the company, under your requisition in the fall of 1896, except those that were purchased under this contract with Gregg?

A. In 1896 I think Gregg furnished about all the ties.

Q. Under your requisition in the fall of 1896 those were the ties that were furnished under this contract in 1897?

A. Yes, sir; there was a man by the name of Pendergrass furnished some ties in 1896.

Q. Was that in the fall or winter of 1896?

A. Yes, this was along in the fall, if I am not mistaken.

Q. Do you know about how many ties?

A. He had a contract for five thousand.

Q. Do you know whether any other ties were furnished except those of Pendergrass and those of Mr. Gregg during this period?

A. I can not remember; it seems to me that in 1896 Gregg furnished about all the ties that were furnished on the road. In 1897 there were quite a good many little bills bought wherever they could be bought.

Q. Can you remember how much in amount these small purchases amounted to?

A. I do not believe I can hardly.

Q. Would they amount to 20,000?

A. In 1897?

Q. Yes, sir.

A. No, I do not think they would; I do not think they would amount to 20,000.

Q. Did you, in your position as roadmaster, know all of the ties that were purchased by the railroad company?

A. Yes, had a record of all of them.

Q. You stated on direct examination that between the
115 years 1892 and 1896, you never got over two-thirds of the requisitions?

A. Yes, sir.

Q. You also stated that for the years 1892 and 1893 you got all that were needed?

A. Well, we got all that we thought would make the road safe.

Q. Is it not a fact that the road was kept in a safe condition during all of these years from 1892 to 1896 with ties that did not exceed two-thirds of the requisitions?

A. No, I would not consider it safe, that is, what we would call a safe railroad. If I had known this was coming on I could have had figures and facts. I had these memoranda all made; I made these reports to the receiver and to Mr. Gregg from the books but now I am taking this right from memory and it bothers me, I can not remember back that far. After I left the railroad, of course, I cast it all from my mind, the railroad business.

Q. What time during the summer of 1897 was the road in such bad condition?

A. Take it in the spring when the frost goes out, and that would be along in March and April; a rotten tie when froze up will hold a great deal better than when it is not froze.

Q. Was it in bad condition through the summer?

A. Yes, sir.

Q. Then, the use of the ties purchased from Gregg did not put the road in a safe condition?

A. Not them alone, did not.

Q. During the first six months of the year 1897 were there any accidents on the road?

A. Not that I know of.

Q. Was there any great damage to property?

A. Yes.

Q. Or engines broken down?

A. Damage to property every time there is a car get off.

Q. Was there any smash-up of cars from derailment?

A. Yes, sir.

Q. So that the cars were unfit for use?

A. Yes, I would say there were.

Q. You can not remember positively about that?

A. No, that is too far back; I have a record of all these accidents. I kept a record of them.

Q. Was the railroad considered so unsafe at that
116 time that any action had been taken against it, any legal action taken against it on that ground, as far as you know?

A. Up within the first six months?

Q. Within the first six months of 1897?

A. No, I think it was later than that. Well, about that time the railroad commissioner of that state went over the road with the superintendent and chief engineer under the receiver; and they promised him to renew the trestles and ties and put them in a safe condition. His report was a very poor report as to the condition of the ties on the road throughout, the fences and trestles and bridges.

Q. About how long after the appointment of the receiver was that, Mr. Mautz?

A. Well, it was within two months or less.

Q. Well, then it was not probably until September, 1897, about that time, but no objection was made by the railroad commissioners to the condition of the road?

A. That is the first time that the railroad commissioners have been over the road, if my memory serves me right, since 1887; I have been on the road since 1886 and during my time on the road the road commissioner was over the road twice, once about 1886 or 1887 and then right after the receiver's appointment.

Q. Then, so far as you know there had been no public complaint which would attract attention of the commissioner to the road on account of its unsafe condition during the time between 1887 and September, 1897?

A. Well, that would be pretty hard—of course, we had a road there that was always considered unsafe, and frequently you would hear the public talking about it; now, whether he heard it from that or not I can not answer that. I often heard people say they would not ride over the road; I heard that often.

Q. Is it not a fact, Mr. Mautz, that the other ties furnished, besides those furnished under the contract with Mr. Gregg, which he sues on in this case, would have been enough to have carried the road through for some months and kept it as a going concern, at a pinch?

A. It would not have been safe, as I said; you are liable to have an accident any time. I used to walk over the track, aim to every two weeks, that is the hardest of the curves. I never walked over that track in my life but what I had to send for some section men to repair some point on the road that had to have attention right away on account of the track spreading, on account of bad ties.

117 Q. Is is not true that different railroad managers spend very different amounts on the repairs of their roads?

A. Yes, sir.

Q. And that railroads differ in the condition of their roadbed as regards safety from one another, while they still continue to do business?

A. Well, you take the trunk line railroads, their standards are different; the quality of the ties, the size you do not find any rotten ties in their track. Our section men, where our line was near the B. & O., would carry the ties taken from that road and put in ours.

Q. Is it not a fact that this road, at all times, was in such financial condition that it had to be very moderate in the matter of expenditures?

A. That is the reason why I said I have always cut their requisitions to kind of suit the railroad's pocketbook, what I thought they could pinch along on and keep it moderately safe by careful watching.

Q. Could it not have gone on for another six months or a year without the use of the ties purchased from Mr. Gregg, and conducted the business as it had before that?

A. I would say no, it could not.

Q. Would it not merely have been an additional element of safety, the purchase from Mr. Gregg of these ties, and which a railroad in the financial condition this one was in could dispense with for a time?

A. No, sir, I do not think so; I do not think they could have dispensed with these ties at all.

Q. Do you believe that if these particular ties had been dispensed with, and the five thousand ties that were purchased in the fall of 1896, and the other ties, perhaps the number of twenty thousand, which were purchased to the number of 20,000 during 1897, had been used that there would have been any serious accidents on the line endangering life or doing great lamage to property?

A. Well, sir, I looked for that any time. I would not have been surprised to hear of an accident at any time on account of the bad ties.

Q. But immediately before these ties were used, and while

the track was in that condition, there were no accidents to amount to anything, were there?

A. Well, we were having accidents right along; there is one accident I can not locate the time when we broke up six or eight cars on account of the track spreading.

118 Q. You do not remember whether that was in 1897 or not?

A. I can not remember; I am trying to see if I can not hitch it on to some other transaction where I could locate it.

Re-direct examination.

By Mr. PRESTON:

Q. You spoke of the condition of the road and the number of accidents, and the number of ties needed, etc., and your reporting this to the receiver?

A. Yes, sir.

Q. Were these written reports filed with the receiver?

A. The tie reports were and the accident reports always went to the superintendent. The receiver made request for the amount of ties that were furnished from 1892 for each year. I made that report to the receiver, and the accident reports they always went to the superintendent, as they happened.

Q. These accident reports were in writing?

A. Oh, yes.

Q. And they were made to the superintendent of the receiver?

A. Yes, sir.

Q. For the year 1897?

A. Yes, sir.

Q. Before you severed your connection with the road, I suppose?

A. Yes, sir.

Q. Now what amount of ties, to the best of your recollection, was furnished for use in 1897, by parties other than Gregg and Pendergrass?

A. Pendergrass he furnished, in the fall of 1896, five thousand ties, about; he had a contract for that.

Q. Now, I am referring to these ties that were furnished in small lots in 1897, your best recollection of the total quantity?

A. Well, I do not think they would exceed 20,000; 15,000 or 20,000, somewhere along there.

Deposition of witness closed.

It being necessary for the witness to leave the city before his deposition could be transcribed and submitted to him for

correction and signature, it is stipulated that the reading and signing of said deposition by the witness is waived; this stipulation is entered into by solicitors appearing at the taking of the deposition and on behalf of the parties represented
119 by them. It is futher stipulated that A. C. Bowman may take said deposition in shorthand and transcribe the same, and such transcript be returned by said notary as the deposition.

GEORGE A. HURD,
*Attorney for Plaintiff, Metropolitan Trust Co.*
PRESTON, CARR & GILMAN,
*Attorneys for Intervenor, Winfield S. Gregg.*

STATE OF WASHINGTON, }
*County of King.* } *ss*:

I, W. A. Keene, a notary public in and for the State of Washington, duly commissioned and qualified, do hereby certify that the above named W. H. Mautz was by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition above set forth was reduced to writing under my direction by A. C. Bowman, counsel appearing agreeing that the said Bowman should take said deposition in shorthand and thereafter transcribe the same from his shorthand notes, and it being stipulated that when said notes were so transcribed they should stand as and be considered the deposition of said witness, without said witness reading and signing the same; that said deposition was taken by me pursuant to and at the time and place and within the hours specified in the notice hereto attached, and that I am not counsel, attorney or relative to either party, or otherwise interested in the event of this suit; and I further certify that the reason for the taking of said deposition is that the witness resides in King County, Washington, more than one hundred miles from the place where said cause is to be tried; and was, at the time of taking said deposition, a notary public in and for the State of Washington.

In witness whereof, I have hereunto set my hand and official seal, this 22nd day of May, 1899.

W. A. KEENE,
[SEAL.] *Notary Public in and for the State of Washington, residing at Seattle.*

It is hereby stipulated that the foregoing deposition may be admitted in evidence on the trial of said cause as the evidence of said witness Mautz.

GEORGE A. HURD,
*Attorneys for Plaintiff, Metropolitan Trust Co.*
HAROLD PRESTON,
*Attorney for Intervenor, Winfield S. Gregg.*

120 And afterwards, to-wit, on the 7th day of June, A. D. 1899, the following second amendment to paragraph 17 of the bill of complaint was filed in the clerk's office of said court, clothed in the words and figures following, to-wit:

*Second amendment to Paragraph 17 of the Bill of Complaint.*

Filed by Leave.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

| | |
|---|---|
| METROPOLITAN TRUST COMPANY OF THE CITY OF NEW York, Trustee, and in its individual right, Complainant, *vs.* THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, *et al.*, Defendants. | No. 887. |

Further amendment of paragraph 17 of the bill of complaint of the Metropolitan Trust Company of the city of New York, Trustee, and its individual right.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

The Metropolitan Trust Company of the city of New York, as trustee and in its individual right, by leave of court this day granted, further amends paragraph 17 of its bill of complaint in respect to the defendants Ed. H. Zurhorst and the Second National Bank of Sandusky, Ohio, by showing to the court:

That on Septemebr 21, 1891, said Sandusky & Columbus Short Line Railway Company entered into a contract in writing with said Lake Erie Construction Company, whereby said Lake Erie Construction Company agreed to construct the railroad of said Sandusky & Columbus Short Line Railway Company and to procure and furnish the right of way for tracks, station yards and side tracks, for which said Railway Company agreed to pay to said Construction Company $25,000 in its first mortgage five per cent. gold bonds, and $25,000 in its fully paid up capital stock for each mile of main track or branches so constructd.

121 That on or about October 18, 1892, the defendant, Ed. H. Zurhorst, acting as agent of said Lake Erie Construction Company, purchased from it from John Philip Feick and Anna Caroline Feick, his wife, those portions of the real estate described in paragraph 17 of the bill as 1.14 and .63 acres.

That on or about October 24th, 1892, the defendant, Ed. H. Zurhorst, acting as agent of said Lake Erie Construction Company, purchased for it from George Marshall and Elizabeth, his wife, that portion of the real estate described in paragraph 17 of the bill as 9.96 acres.

That both of said parcels of real estate were purchased and acquired by said Lake Erie Construction Company, through said Zurhorst, as it- agent, for the purpose of carrying out its said contract of September 21, 1891, with said Sandusky & Columbus Short Line Railway Company, and as part of the railroad and yards which said Lake Erie Construction Company had contracted with said Railway Company to acquire and furnish for the consideration aforesaid.

That said Zurhorst caused said Marshall and wife and said Feick and wife to make deeds for the land so purchased to him, individually, but he acquired and held the title so conveyed simply as the agent and trustee of said Lake Erie Construction Company, for which and on whose behalf, while acting as its agent, he made said purchases.

That said Lake Erie Construction Company paid said Zurhorst for said real estate, prior to July 28, 1893, and on or about said day said Lake Erie Construction Company, with the knowledge and consent of said Zurhorst, turned over the possession of said real estate to said Sandusky & Columbus Short Line Railway Company, as part of the railway and yards which it had agreed to furnish and construct, and said Sandusky & Columbus Short Line Railway Company paid to it therefor the consideration in stock and bonds provided for in said contract.

That said Zurhorst, at the time of said payment by said Railway Company to said Construction Company, was the Secretary of said Railway Company, and as such executed and delivered the stocks and bonds so paid, and at the same time or subsequently received the same, or a portion thereof, from said Lake Erie Construction Company for its own use and benefit.

That said real estate, since a time long prior to the execution of said mortgage by the said Zurhorst to A. W. Prout, to secure the note dated Oct. 4, 1893, and which was recorded Feby. 13, 1894, has been used by said Railways Com-
122 pany and its successors as a part of this railroad, and has been occupied with their tracks. That said Railway Company and its successors have always paid the taxes on said real estate; have also, with the knowledge and consent of said Zurhorst, insured a building which is located on said

9.96 acre tract in the name of said Zurhorst, as their Trustee, and have paid the insurance premiums thereon.

[SEAL.] METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
By CHAS M. JESUP, *2d Vice-President.*

Attest:
RAYMOND CHATRY,
*Assistant Secretary.*
PARSONS, SHEPARD & OGDEN,
MORISON R. WAITE,
*Of Counsel.*

STATE OF NEW YORK,
*County of New York, Southern District of New York,* } *ss:*

Charles M. Jesup, being duly sworn, says: I am the Second Vice-President of the Metropolitan Trust Company of the city of New York, the above named complainant. I have read the foregoing amendment to its bill of complaint and know the contents thereof. The same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

CHAS. M. JESUP.

Sworn to and subscribed to before me, this 29th day of May, 1899.

WM. MASON SMITH,
*Notary Public, N. Y. County.*

And afterwards, to-wit, on July 5, 1899, H. M. Butler, Special Master, filed his report pursuant to the order of February 20th, 1899, the substance of which is contained in the subsequent report herein set out.

And afterwards, to-wit, on July 8, 1899, an order was made on the Journals of said court in the words and figures following, to-wit:

123 *Order of Reference.*

THE METROPOLITAN TRUST COMPANY OF THE CITY OF New York, Trustee, etc., Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company and others, Defendants. } No. 887.

Upon motion of the plaintiff, it is ordered:

1. That all persons claiming a lien upon or preferential right in the property in the possession of S. M. Felton, as

receiver of the Columbus, Sandusky and Hocking Railroad Company, prior to the lien of the mortgage of said company to the Mercantile Trust Company, dated November 9th, 1895, or of its mortgage to Metropolitan Trust Company, dated November 11th, 1895, present their claims on or before August 25, 1899, to H. M. Butler, Special Master, at his office in Columbus, Ohio; and that in default of such presentation all such claims be forever barred. Said order shall not apply to persons claiming a lien or preferential right on account of material, supplies, labor or other services rendered to said Columbus, Sandusky and Hocking Railroad Company within six months prior to the appointment of said Felton, as receiver thereof, or on account of traffic balances with other Railroad Companies accruing within said six months, the presentation of such claims having been called for by the former order of this court, entered on February 20th, 1899. And it is now ordered that the claims of all persons covered by said order of February 20th, 1899, which have not been presented to the master in accordance with the terms thereof, be, and the same are hereby, forever barred.

2. That said H. M. Butler, who is hereby appointed special master for that purpose, determine and report to the court whether any of the following persons have a lien or preferential claim upon said property, to-wit: Jonas M. McCune, Jacob Klee, The Second National Bank of Sandusky, Ohio, Ed. H. Zurhorst, Hewson L. Peeke, Frank Stang, James Flynn, John J. Waginet, D. L. Ransom, guardian; the holders of receiver's certificates issued by N. Monsarrat under the orders of the Court of Common Pleas of Crawford County, Ohio; persons who furnished supplies, labor or other services to said
124 Railroad Company within six months prior to the appointment of said Felton as receiver thereof, and railroad companies or other persons claiming traffic balances accruing within six months, whose claims have been filed with said master under said order of February 20th, 1899; any and all other persons who may present claims, as provided in paragraph 1 of this order.

3. The master shall report the amounts and priorities of all such claims, the dates on which they accrued and the nature of the consideration therefor, as well as the amounts and priorities of the liens of said mortgages to The Mercantile Trust Company, and to the Metropolitan Trust Company. He shall hear and determine said matters upon the pleadings and evidence heretofore filed in this cause, the claims and evidence heretofore submitted to him under said order of February 20, 1899, and upon such other evidence introduced in the form of

affidavits or otherwise as may be presented to him on or before August 25th, 1899. He may consider as evidence the sworn statement of the auditor of the receiver made up from the books of said Railroad Company, which statement said auditor is hereby directed to file with the master as soon as practicable, but not later than August 15, 1899, showing (1) the dates on which the several claims included in Exhibit "A" of the report heretofore filed by said master, and the several items constituting the same, originated, in arriving at which dates he shall be guided, as far as possible, by the dates of the invoices; (2) the nature of the consideration for said claims; (3) the amounts thereof having special reference to the amounts originating before and after December 1, 1896. Said statement, when filed with the master, may be inspected by any claimant.

4. After August 15th, 1899, the master may hear counsel on behalf of any claims until September 10th, 1899, and shall file with the clerk of this court, on or before September 25th, 1899, his report, together with all the evidence produced before him. Exceptions to said report may be filed with the clerk of this court by any of the claimants affected thereby on or before October 9th, 1899, the same to be heard by the Court at Cincinnati, October 12th and 13th, 1899.

5. The report heretofore filed by the master under said order of February 20th, 1899, is referred back to him, in order that he may file a single report covering all of the matters included in this order.

6. The master will mail copies of this order to each party to this suit, or his attorney of record, and to all persons
125 who have filed claims with him under said order of February 20th, 1899, and shall publish its substance once a week for two consecutive weeks in one newspaper of general circulation published in Columbus, Ohio, and in one newspaper of general circulation published in New York City.

7. This order shall not apply to persons to whom S. M. Felton is indebted or liable as receiver, upon receiver's certificates or otherwise.

And afterwards, to wit, on the 7th day of August, A. D. 1899, the following amendment of bill in response to answer of Sinks, Trustee, was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Amendment of Bill in Response to Answer of Sinks, Trustee.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW York, as Trustee, and in its individual right, Complainant,
*against*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company and others, Defendants.
} No. 887.

Amendment of bill of complaint so as to make it responsive to the answer of Sinks, Trustee.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

The Metropolitan Trust Company of the city of New York, as trustee and in its individual right, by leave of court this day granted, further amends its bill of complaint so that the same shall be responsive to the matters set up in the answer of the defendant, George W. Sinks, Trustee, by showing to the court as follows: Upon information and belief:

The mortgage executed by David S. Gray, and Eugenia D. Gray, his wife, under date of June 1st, 1892, to George W. Sinks, Trustee, as set out in paragraph XII of the answer of the said Sinks, herein, as inferior in all respects to the liens of the plaintiff herein, and of the defendant, The Mercantile Trust Company, as Trustee.

126 The said property so conveyed by the said David S. Gray and Eugenia D. Gray, his wife, under the said mortgage, was not the property of the said Gray or of his wife, but was at that time the property of the Columbus, Shawnee & Hocking Railway Company. The said The Columbus, Shawnee & Hocking Railway Company had purchased the said property from the owner thereof on February 5th, 1890, and March 15th, 1890. It was the purpose of the said Railway Company to convert the said property into shop and terminal properties for itself in the city of Columbus, Ohio. The said Railway Company, or its successors in interest, which are hereinafter referred to, made out of its or their own funds all the payments made upon said property, both at the time of the purpose thereof and subsequently, and paid the whole of the purchase price therefor. Neither the said Gray nor his wife ever had, or claimed to have, any personal interest whatsoever in the said property. The said Gray merely acted for

the convenience of the said Railway Company as the holder of the naked, legal title thereto.

Prior to the said 5th day of February, 1890, and the 15th day of March, 1890, the said The Columbus, Shawnee & Hocking Railway Company has sold and conveyed to the Metropolitan Trust Company of the city of New York, in trust to secure an issue of five thousand ($5,000) bonds of one thousand ($1,000) dollars each, its railroad and all its lands, tenements, hereditaments, rights of way, fixtures, railway ties, locomotives, tenders, engines, cars, carriages, equipments, machinery, tolls, implements, materials, chattels, franchises, privileges, rights, interests, telegraph lines, rents, tools, income, revenue, resources, reservations, benefits, investments, assets and estates, legal and equitable, then owned and thereafter to be acquired by the said Railway Company. Under the said mortgage or deed of trust, bonds amounting to three million seven hundred and twenty-eight thousand dollars ($3,728,000) were issued and passed into the hands of *bona fide* holders for value. The said mortgage or deed of trust was filed for record and recorded in each of the counties in which the said railroad ran, on or before March 15th, 1890.

The said The Columbus, Shawnee & Hocking Railway Company under date of April 1, 1891, sold and conveyed to the Metropolitan Trust Company of the city of New York in trust to secure one thousand ($1,000) bonds of the par value of one thousand dollars ($1,000) each, all and singular the entire railway of the said Railway Company, including all branches,
leases, contracts used in connection therewith, depots,
127 lots machine shops, bridge, real estate, right of way,
fixtures, buildings, fences, ties, locomotives, engines, cars, equipment, tools, implements, franchises, rents, income, telegraph lines, assets and estates, legal and equitable, which said Railway Company owned on said April 1st, 1891, or which it would thereafter acquire, including all car trust leases, contracts, obligations and securities. Under the said mortgage or deed of trust there were issued and passed into the *the* hands of *bona fide* owners for value, bonds amounting to seven hundred and eight thousand ($708,000) dollars. The said mortgage or deed of trust was filed for record, and recorded, in each of the counties in which the real and personal property of the said Railway Company was situated before April 15th, 1891.

Thereafter and on or about December 30th, 1893, the said The Columbus, Shawnee & Hocking Railway Co., did, pursuant to the statutes of the state of Ohio in such case made and provided, duly and validly consolidate with the Sandusky & Columbus Short Line Railway Company, so as to constitute and they did by such consolidation, constitute the Columbus,

Sandusky & Hocking Railway Company. The said Columbus, Sandusky & Hocking Railway Company assumed payment of the foregoing mortgages.

On or about the 5th day of July, 1895, said Metropolitan Trust Company of the City of New York, trustee of the aforesaid mortgage did, having been duly requested so to do, the said The Columbus, Sandusky & Hocking Railway Company having defaulted in the payment of the interests due on the aforesaid mortgages and on certain other mortgages, institute proceeding in the Crawford county Court of Common Pleas, at Bucyrus, Ohio, for the foreclosure of the said and other mortgages. In said proceeding, a sale was made of the property covered by the aforesaid mortgages to George W. Sinks and Daniel B. Hatch, purchasing committee. By the said sale the premises in paragraph XII of the said bill of complaint more particularly set forth passed to the said Sinks and Hatch, purchasing committee. The sale was confirmed on or about November 4th, 1895, and a deed given of the property sold to said Sinks and Hatch, purchasing committee, and thereafter the said Sinks and Hatch, purchasing committee, for value, conveyed to the Columbus, Sandusky & Hocking Railroad Company, a defendant herein, the said property.

Thereafter the said Columbus, Sandusky & Hocking Railroad Company made its said mortgages or deeds of trust
128 more at large set forth in Paragraph IV and XI of the bill of complaint herein.

At the time of the acquisition of said premises herein in this amendment more particularly concerned, the said The Columbus, Shanwee & Hocking Railway Company entered into the possession thereof. From that date to this said railway company or its successors in interest or the receivers thereof, and no other persons, have been in open, notorious, complete and continuous possession thereof, using the same as shop and terminal properties in the city of Columbus. Either the said George W. Sinks trustee, knew of the said ownership and of the said possession or his beneficiaries knew thereof or they might have known thereof by the exercise of reasonable diligence.

Wherefore the complainant again prays that it be decreed to have a lien upon the said premises both as trustee under the said mortgage or deed of trust and as holder of the said Monsarrat, receiver, certificates and that the Mercantile Trust Company as trustee also be deemed to have a lien thereon,

prior and superior to that of the defendant, George W. Sinks, trustee, and of any of his beneficiaries.

[SEAL.] THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
By CHAS. M. JESUP, *2d Vice-President.*

Attest:
BEVERLY CHEW, *Secretary.*

STATE OF NEW YORK, *County of New York,* } ss:

Charles M. Jesup, being duly sworn, says: I am the 2d vice-president of the Metropolitan Trust Company of the City of New York, the above named complainant. I have read the foregoing amendment to its bill of complaint, and know the contents thereof. The same is true to my own knowledge, except as to the matters therein alleged upon information and belief, and as to those matters I believe it to be true.

CHAS. M. JESUP.

Sworn to and subscribed before me this 21st day of July, 1899.

[SEAL.] J. C. KLINCK,
*Notary Public in and for Kings County, N. Y.*

Cert. filed in New York county.

129 And afterwards, to wit, on the 25th day of September, A. D. 1899, there was filed in the clerk's office of said court a certain proof of claim in this case theretofore filed before said H. M. Butler, special trustee, which said proof of claim is clothed in the words and figures following, to wit:

*Proof of Claim.*

Affidavit to claim.

STATE OF OHIO, *Muskingum County,* } ss:

Before me, a notary public in and for said county, personally appeared Winfield S. Gregg, who being first duly sworn, says that he is the owner of certain claims, true copies of which are hereto attached, marked "Exhibit A," "Exhibit B," "Exhibit C," "Exhibit D," "Exhibit E," "Exhibit F," "Exhibit G," and "Exhibit H," that all of said claims are correct, just and law-

ful, and the consideration therefor was merchandise and lumber, sold and delivered and work and labor performed for the said Columbus, Sandusky & Hocking Railroad Company, under and by virtue of contracts between the said Columbus, Sandusky and Hocking Railroad Company and the said Winfield S. Gregg, that no part of any of said claims have been paid and that there are no counter-claims or off-sets against the said claims, and that there is justly due the said Winfield S. Gregg, thereon the sum of $6804.49, with interest on $4709.53 from June 25th, 1897, at the rate of 6 per cent. per annum, and interest on $394.96 from the 12th day of May, 1897, at the rate of 7 per cent. per annum, and interest on $1700.00 from the 25th day of May, 1897, at the rate of 7 per cent. per annum.

Affiant further says that the claims hereto attached marked "Exhibit A," is for railroad ties furnished to said railroad company, under and by virtue of a contract, dated Dec. 1st, 1896, and that said goods were delivered to said railroad company in the month of May and on the 1st, 2nd and 3rd days of June, 1897, and that under the terms of said contract, payment for same accrued due to said Winfield S. Gregg on the 25th day of June, 1897.

Affiant further says that an inventory taken by the receiver of said railroad company on the 10th day of June, 1897, showed that of the ties so sold and delivered as aforesaid, there were on hand upon said date ties to the amount and value of $3200.00 which ties were used by said receiver in the operation
130 and maintenance of said railroad as a going concern, that said account was duly presented to said receiver as a claim against said receiver in said amount and as such allowed by said receiver as per following certificate:

"This is to certify that Winfield S. Gregg has filed with me a claim against the Columbus, Sandusky & Hocking Railroad Company for the sum of $4709.53 for material furnished by him to said Company, and that I have allowed the same as a claim which accrued due within six months prior to the appointment of S. M. Felton, receiver for said company. (Signed.) E. M. Fisher, auditor for the receiver."

Affiant further says that said claim is a claim for material and supplies and was necessarily incurred and grew out of the operation and maintenance of said railroad as a going concern from day to day, and was a necessary operating expense in keeping and using said railroad and preserving said property in a fit and safe condition as such, that the road master of said railroad had, in the fall of 1896, made requisition on the company for from 80,000 to 90,000 ties as being necessary, to put

said road in a safe and proper condition, but that the said company had only contracted for 35,000 ties under the contract heretofore referred to, dated Dec. 1st, 1896.

Affiant further says that the claims herein attached marked Exhibit "B" and Exhibit "C" are promissory notes and are genuine and valid obligations of said railroad company and are true and unpaid and represent an indebtedness for materials and supplies sold and delivered to and work and labor performed for the said Columbus, Sandusky & Hocking Railroad Company as follows:

Those notes dated May 12th, 1897, represent the following:

Feb. 22nd, 1897, $122.44, shop lumber for repair of cars.

Feb. 28th, 1897, $155.68, grading at Congo—$172.37, less 10 per cent.

Mar. 1st, 1897, $62.90, ties $2462.90, less $2400.00 paid in cash.

Mar. 16th, 1897, $54.47, switch ties shipped to Bellevue, $80.62, less $26.15, deducted for inspection.

Total $395.49, error 53 cents.

Affiant further says that the first three items before-named accrued due March 25, 1897, and the last item April 25th, 1897.

131 Affiant further says that the claim hereto attached and marked "Exhibit D," "Exhibit E," "Exhibit F," "Exhibit G" and "Exhibit H" are promissory notes and are genuine and valid obligations of said railroad company and are due and unpaid and represent an indebtedness for materials and supplies, sold and delivered to, and work and labor performed for the said Columbus, Sandusky & Hocking Railroad Company as follows:

The notes dated May 25, 1897, represent the following:

March 25, 1897, $71.50, piling shipped to Sandusky.

March 27, 1897, $98.75, shop lumber for repair of cars.

March 31, 1897, $81.25, piling shipped to Sandusky.

March 31, 1897, $1873.29, ties furnished in March.

April 12, 1897, $53.75, switch ties shipped to Drake's siding.

April 17, 1897, $81.25, piling shipped to Sandusky.

April 20, 1897, $53.75, switch ties shipped to Drake's siding.

April 22, 1897, $58.50, piling shipped to Sandusky.

April 12, 1897, $128.20, shop lumber for rapair of cars.

Total $2500.24, less $500.24 cash paid to Winfield S. Gregg.

Balance 2000.00, May 25th, 1897.

Affiant further says that those notes dated May 25th, 1897, of the said railroad company, in favor of said Winfield S. Gregg, were given for said sum of $2000.00 one of which called for the sum of $300.00 was paid by said S. M. Felton, as re-

ceiver, leaving a balance of $1700.00 being the five remaining notes, dated May 25th, 1897.

Affiant further says that his claims arising on and represented by all said notes, dated May 12th, 1897, and May 25th, 1897, respectively, are claims for materials and supplies and work and labor performed as before specified and were necessarily incurred and grew out of the operation and maintenance of said railroad as a going concern from day to day and were necessary operating expenses in keeping and using said railroad as a going concern and the preserving of said property in a fit and safe condition as such, that all said materials and supplies were furnished within six months prior to the appointment of the receiver herein and accrued due less than six months prior to the date of the appointment of said receiver herein.

WINFIELD S. GREGG.

132 Sworn to before me and subscribed in my presence this 4th day of April, A. D. 1899.

[SEAL.] C. T. MARSHALL,
*Notary Public in and for Muskingum County, Ohio.*

EXHIBIT "A."

ZANESVILLE, OHIO, *June 3rd, 1897.*

C., S. & H. R. R. Co., Columbus, O.: to W. S. Gregg, Dr., dealer in all kinds of hard wood lumber.

Dimension stock, cross-ties and railroad lumber a specialty.

June 3rd, ties taken May Est., as per contract, Dec. '96, as follows:

| | | |
|---|---|---|
| 9115-6 x 9 at 38 cts. | $3463 70 | |
| 955-6 x 9 at 19 cts. | 181 45 | |
| 2804-6 x 8 at 35 cts. | 981 40 | |
| 461-6 x 8 at 18 cts. | 82 98 | $4709 53 |

EXHIBIT "B."

$194.96. COLUMBUS, OHIO, *May 12th, 1897.*

Sixty days after date we promise to pay to the order of W. S. Gregg one hundred and ninety-four and 96-100 dollars at the Clinton National Bank with interest at the rate of seven per centum per annum from date.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.
By A. W. DUNNING, *Assistant Treasurer.*

Value received, No. 14230.
When due, July 12th, 1897.

EXHIBIT "C."

$200.00 COLUMBUS, OHIO, *May 12th, 1897.*

Ninety days after date we promise to pay to the order of W. S. Gregg two hundred dollars at the Clinton
133 National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum from date.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.
By A. W. DUNNING, *Assistant Treasurer.*

Value received, No. 14231.
When due, August 10th, 1897.

EXHIBIT "D."

$300.00. COLUMBUS, OHIO, *May 25th, 1897.*

Sixty days after date we promise to pay to the order of W. S. Gregg three hundred dollars at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum from date.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.
By A. W. DUNNING, *Assistant Treasurer.*

Value received.
When due July 24th, 1897.
Countersigned:
W. S. GUERIN, *President.*

EXHIBIT "E."

$300.00. COLUMBUS, OHIO, *May 25th, 1897.*

Ninety days after date we promise to pay to the order of W. S. Gregg three hundred dollars at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum from date.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.
By A. W. DUNNING, *Assistant Treasurer.*

Value received.
When due, August 23rd, 1897.
Countersigned:
W. S. GUERIN, *President.*

EXHIBIT "F."

$300.00. COLUMBUS, OHIO, *May 25th, 1897.*

Ninety days after date we promise to pay to the order of W. S. Gregg three hundred dollars at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum from date.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.
By A. W. DUNNING, *Assistant Treasurer.*

Value received.
When due, August 23rd, 1897.
Countersigned:
W. S. GUERIN, *President.*

134 EXHIBIT "G."

$400.00. COLUMBUS, OHIO, *May 25th, 1897.*

Sixty days after date we promise to pay to the order of W. S. Gregg four hundred dollars at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum from date.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.
By A. W. DUNNING, *Assistant Treasurer.*

Value received.
When due, July 24th, 1897.
Countersigned:
W. S. GUERIN, *President.*

EXHIBIT "H."

$400.00. COLUMBUS, OHIO, *May 25th, 1897.*

Ninety days after date we promise to pay to the order of W. S. Gregg four hundred dollars at the Clinton National Bank, Columbus, Ohio, with interest at the rate of seven per centum per annum from date.

THE COLUMBUS, SANDUSKY & HOCKING R. R. CO.
By A. W. DUNNING, *Assistant Treasurer.*

Value received.
When due, August 23rd, 1897.
Countersigned:
W. S. GUERIN, *President.*

And afterwards, to wit, on the 25th day of September, A. D. 1899, there was filed in the clerk's office of said court a certain proof of claim in the above entitled cause, theretofore filed before H. M. Butler, special master, which said proof of claim is clothed in the words and figures following, to wit:

ZANESVILLE, OHIO, *Apr. 4, 1899.*

C., S. & H. R. R. C.,—S. M. Felton, Receiver, Columbus, O.:

To W. S. Gregg, Dr.

Dealer in all kinds of Hard Wood Lumber.

Dimension stock, cross-ties and railroad lumber a specialty.

June 19, by car No. 9425, order No. 2432,
770 ft. piling at 7 cts. .....$ 53 90

135 Dock repairs:

Feb. 2, by car No. 2509, 301 pcs. hickory,
9632 ft., at $11. ..... 105 90

Car repairs:

Feb. 6, by car No. 9433, order No. 2296, 512
ft. piling at 5 cts. ..... 25 60 $185 45

Trestle repairs.

THE STATE OF OHIO, } ss:
*Muskingum County* }

Before me, a Notary Public in and for said county, personally appeared Winfield S. Gregg, who, being duly sworn, says that he is the owner of the claim, a copy of which is hereto attached, that said claim is correct, just and lawful and the consideration therefor was 770 ft. piling at 7 cts., $53.90, Jan. 19, 1899—9632 ft. lumber at $11—$105.95; Feb. 2, 1899, and Feb. 6, 1899—512 ft. piling at 5 cts., $25.60; that no part of the same has been paid except as stated thereon; that there are no counter claims or set offs against the same to the knowledge of affiant, except——, and that there is justly due the said Winfield S. Gregg thereon the sum of one hundred eighty-five 45-100 dollars, bearing interest at 6 per cent. per annum from Mch. 25, 1899.

(Signed) WINFIELD S. GREGG.

Sworn to before me and signed in my presence this 5th day of April, 1899.

[SEAL.] C. T. MARSHALL,
*Notary Public, Muskingum County, State of Ohio.*

And afterwards, to wit: on the 25th day of September, A. D., 1899, there was filed in the clerk's office of said court a certain affidavit of Frederic J. Picard, in this case, theretofore filed before H. M. Butler, special master, which said affidavit is clothed in the words and figures following, to wit:

136 *Affidavit of Frederic J. Picard.*

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST COMPANY OF THE CITY of New York, as Trustee, and in its individual right, Complainant,
*against*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company and others, Defendants,
} No. 887.

Affidavit in support of claims of the Zanesville Terminal Railway Company The Columbus, Terminal and Transfer Railroad Company and other claims.

FREDERIC J. PICARD of lawful age, being first duly sworn says that he was a director of the said The Columbus, Sandusky & Hocking Railroad Company during the period from its organization about November, 1895, to the first day of June, 1897, and still is a director of said company, and as such director became and was during said period acquainted with the affairs of said company; that during said period, and particularly during the last six months thereof, said company diverted a large part of its earnings to the payment of Car Trust notes and obligations and other debts and obligations of the Columbus, Sandusky & Hocking Railway Company, its predecessor company, and thus left unpaid a large part of its own operating expenses and debts and obligations incurred to keep the said company and its property a going concern, and to preserve the integrity thereof, parts of which said operating expenses and debts and obligations are still outstanding and unpaid and entitled to be paid as preferred debts of said Railroad Company; that during said period said Railroad Company created and accumulated indebtedness and liabilities of

its own, not including any interest on bond indebtedness, to the amount of about $500,000, by failure to pay operating expenses of its own to the amount of about $45,000, and by the diversion of about $455,000 of its earnings to the payment of Car Trust notes and other obligations and the indebtedness of its said predecessor company, the said The Columbus, Sandusky & Hocking Railway Company, instead of applying its said earnings to the payment of its own unpaid debts
137 and obligations, parts or all of which are entitled to be paid out of the earnings or *corpus* of said railroad and railroad property, as preferred debts of said Railroad Company; that, of said sum of $455,000, about the sum of $270,000 was for said Car Trust notes or obligations paid during said period as aforesaid and of said sum of $270,000 about the sum of $100,000 was paid during the six months next prior to the 1st day of June, 1897; that the said diversion of said earnings and especially that to the payment of said Car Trust notes of obligations, was in the interest, and directly inured to the benefit of the said complainants, said Mercantile Trust Company and said Metropolitan Trust Company of the City of New York, as the mortgagees and trustee of the respective mortgages held and represented by them and set forth in their bills of complaint herein, in that among other things, the payment of said Car Trust notes or obligations released *pro tanto* from the adverse claim of ownership of said cars and property by the holders of said Cart Trust notes or obligations, and from the lien and operation of the same, a large amount of the cars and property operated and used by said Railroad Company, which cars and property, until said Car Trust notes *of* obligations were paid, remained subject to such adverse claim of ownership and to the lien and operation of the said Car Trust notes or obligations, but which, when and so far as said Car Trust notes *of* obligation were paid and the lien thereof removed therefrom, thereby became the cars and property of said railroad company and at once as after acquired property came and fell within and under the operation of the liens of the said respective mortgages of said complainant, and thereby increased by so much their respective mortgage securities; that the said diversion of earnings for the benefit of said mortgages was of such an amount and of such character as would enable this court out of the amount thereof, under the application of the six months' rule usually applied in such cases, to cause to be paid all of the unpaid claims of said Railroad Company the payment of which accrued within the six months next prior to June 1st, 1897, or which are entitled to be paid under the usual application in such cases of said rule; that the earnings of said Railroad Company and the pur-

poses of which the same were applied, and particularly during the six months next prior to June 1st, 1897, are or should be fully shown by the books and accounts of said Railroad Company that are now in the possession of the Receiver of
138 the property of said company appointed in this action, and to which affiant has not access and so is unable to state with greater particularity or more in detail the amount of the earnings of said Railroad Company during said period and the purposes or objects to which the said Car Trust notes or obligations which were paid the said earnings were diverted or applied and that Car Trust notes or obligations which were paid by said diversion of earnings, as aforesaid, were a part of the entire amount of Car Trust notes or obligations for the payment of the balance or other parts of which Receiver's Certificates have been authorized and issued by orders of this court in the above entitled action.

FREDERIC J. PICARD.

Sworn to before me and subscribed in my presence by said Frederic J. Picard, this 24th day of August, A. D., 1899.

[SEAL.] WILLIAM G. BROSSMAN,
*Notary Public in and for Franklin County, Ohio.*

And afterwards, to-wit, on the 25th day of September, A. D., 1899, there was filed in the clerk's office of said court a certain affidavit of E. M. Fisher, theretofore filed before H. M. Butler, special master, which said affidavit is in the words and figures following, to-wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY, ETC., Complainants,
*vs.*
COLUMBUS, SANDUSKY AND HOCKING RAILROAD CO., *et al.*, Defendants. } No. 887.

STATE OF OHIO,
*Franklin County, Ohio,* } *ss*:

Before me personally appeared E. M. FISHER, who, being by me first duly sworn, deposes and says, that he is now, and has been since July 30, 1897, the Auditor for the Receiver in this cause; that he has had a wide experience as an expert in railroad accounts and is familiar with, and has examined the books of the said Columbus, Sandusky & Hocking R. R.
139 Company, for the eleven months ending June 1, 1897; that the books of the said company show gross earnings

from operation of the said Railroad Company for the said eleven months of ..... $720,493 95
That during the same period they show operating expenses of..... $621,395 78
Taxes paid for the same period..... 32,948 77
Rents for yards, tracts and terminals for the same period..... 90,052 22—$744,396 77

*And that for said period*, said books show a deficit of ..... $23,902 82

And affiant further says that the books of the Railroad Company show that of the interest falling due upon the first mortgage bonds and the first mortgage scrip, October 1, 1896, there was paid by the said Railroad Company, in cash, by adjustment, and otherwise the sum of (not exceeding) $8,442.31.

And affiant says there has not been otherwise paid in cash within the twelve months prior to tht appointment of S. M. Felton, Receiver, and of the coupons of, or interest upon either the General Mortgage or Prior Lien Mortgage of said Railroad Company.

E. M. FISHER.

Sworn to before me and subscribed in my presence, this 25th day of August, 1899.

[SEAL.] E. L. McCUNE,
*Notary Public in and for Franklin County, Ohio.*

And afterwards, to-wit, on the 25th day of September, A. D., 1899, there was filed in the clerk's office of said court a certain affidavit of Auditor Fisher, in this case, theretofore filed before H. M. Butler Special Master, which said affidavit is clothed in the words and figures following, to-wit:

140 *Affidavit of Auditor Fisher.*

United States Circuit Court for the Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, Trustee, Complainant,
*against*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY, Defendants.

Consolidated cause.

Statement from the books and accounts of the C., S. & H. R. R., showing payments made upon Car Trusts within the six

months of the appointment of the receiver herein and funds acquired from sources other than operation, together with a statement of the net deficit during the same period, which said books and accounts were offered in evidence August 25th, 1899, in opposition to the affidavit of F. J. Picard in support of the claim of the Zanesville Terminal Railway Co., The Columbus Terminal and Transfer R. R. Co., and other claims:

E. M. FISHER, being duly sworn, says that he is and has been since the appointment of the receiver in this case, the Auditor for said Receiver. That he is familiar with the books and accounts of said company, and that he has made a full and complete investigation of the same and that they show:

First. Payment of car trust within six months prior to the appointment of the Receiver, -86,325.77.

Second. Money acquired by loan and sale of bonds within the same period, -121,100.69.

Third. Gross earnings of the C., S. & H. R. R. during the same period, -356,113.63.

Fourth. Operating expenses, including taxes and rental, during the same period, $408,510.39.

Deficit for same period, $52,396.76.

E. M. FISHER.

Sworn to and subscribed in my presence, this 25th day of Sept., 1899.

[SEAL.] E. L. McCUNE,
*Notary Public in and for said Co.*

141 And afterwards, to-wit, on the 25th day of September, A. D., 1899, came the Special Master and filed in the clerk's office of said court his certain report in this case, which said report is clothed in part in the words and figures following, to-wit:

*Special Master's Report.*

In the United States Circuit Court, for the Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST COMPANY OF New York, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendant.
} In Equity. No. 887.

Consolidated Cause.

Special master's report.

Being a Consolidated Report under the modified order of a reference entered February 20th, 1899, and under the order of reference entered July 8th, 1899.

To the honorable, the judges of said court:

This report consists of three parts:

Part *I.* Contains the report of this Master under the second order of reference to him, entered February 20th, 1899, and its modification.

Part II. Contains the report of this Master under the second order of reference to him, entered July 8th, 1899.

Part III. Relates to, describes and lists the evidence submitted to the Master, which he is authorized by said second order to consider, and directed to transmit with his report, which evidence includes the original claims filed with him and liens presented to him under said first and second orders of reference.

Part I. Being a report in response to the directions contained in the first order of reference, viz: The modified order of February 20th, 1899.

The undersigned, Special Master, in said cause, to whom the above cause was referred, by order entered therein on the 20th day of February, A. D., 1899, "to take and state
142 on account of the indebtedness of the Receiver of the said Railroad Company and of the said Railroad Company itself, as to all claims and demands for material, supplies and labor and other services rendered to the said Receiver, or to the said Railroad Company within six months prior to the appointment of the said Receiver, and all traffic balances with other Railroad Companies accruing within six months prior thereto, except as to the claims of such creditors and claimants

as are specifically made parties of this suit." Such accounts and demands to be, by the terms of said order, "produced and proved before the said Master on or before the 5th day of April, 1899, under penalty of thereafter being disallowed within the discretion of the court—" It being further ordered that said Master "give notice" to all creditors and claimants as aforesaid to present their accounts and demands before said Master within the said specified time, by application to be made once a week for two successive weeks in one newspaper of general circulation, published within each of the cities of Columbus, Ohio, and New York, New York, and that he give further notice by mail to each and all creditors and claimants as aforesaid, of whose names and addresses he may be apprised by the Auditor of the Receiver, or otherwise," said order being subsequently modified as hereinafter stated—

Respectfully reports: "That pursuant to the directions of said order of February 20th, 1899, he caused a full and complete notice of said order to be published once a week for two successive weeks in one newspaper of general circulation published within each of the cities of Columbus, Ohio, and New York City, New York, respectively, viz: in The Ohio State Journal and in the New York Times. Said Master has received from each of said papers the usual publisher's certificate, certifying to the publication of said order of February 20th, 1899, in the papers aforesaid respectively. (See the certificates herewith transmitted.)

That within a reasonable time after the entry of said order, to-wit: on March 11th, 1899, the Auditor for the Receiver furnished to said Master a list of the names and addresses of all of the creditors, or supposed creditors, of the said Railroad Company that were known to the said Auditor and Receiver, who had, or were supposed to have, claims or demands against said Railroad Company of the class called for by said order accruing within six months prior to the appointment of said Receiver.

Said Master did, within a reasonable time thereafter,
143 to-wit: on the 14th and 15th days of March, A. D., 1899, address and mail, postage paid, to each and every one of such creditors, a printed copy of said notice, enclosing therewith a printed blank form of oath to claim. (A copy of said notice is as follows:)

Notice to certain cerditors of the Columbus, Sandusky & Hocking Railroad Company and to the creditors of the Receiver thereof.

In the Circuit Court of the United States for the Southern District of Ohio, Sixth Circuit, Cause No. 887. The Metropolitan Trust Company of New York *vs.* The Columbus, Sandusky & Hocking Railroad Company, *et al.*

On the 20th day of February, A. D., 1899, the said court made an order in substance that said cause be referred to H. M. Butler as master, to take and state an account of the indebtedness of the Receiver of said Railroad Company and also of the indebtedness of the said company itself, as to all claims and demands for materials, supplies and labor and other services rendered to the said Receiver and also to the said Railroad Company, within six months prior to the appointment of the said Receiver, and of all traffic balances with other railroad companies accruing within six months prior thereto. Ordered, that, except as hereinbelow noted, all and any accounts and demands as aforesaid, being demands for which a preferential right may be claimed or asserted, be produced and proved before the said master on or before the 5th day of April, 1899, under the penalty of thereafter being disallowed, within the discretion of the court.

Creditors and claimants who are specially made parties to the above entitled suit are expected from the operation of said order of said court.

Ordered, that said master give published notice to claimants to present their accounts and demands before him as aforesaid, once a week for two successive weeks in one newspaper of general circulation in Columbus, Ohio, and one newspaper of general circulation in the City of New York.

Special attention is called to the shortness of the time for presentation of claims and to the desirability of promptness on the part of creditors.

H. M. BUTLER, *Master in said cause,*
*Room 5, Hoster Block (35 1-2 N. High St.)*
*Columbus, O., Telephone 110.*

P. S.—Blank form for proof of claim is hereto at-
144 tached. Time for filing expires Wednesday, April 5, at 12 o'clock midnight.

March 14, 1899.

That on the 24th day of March, 1899, the aforesaid order to the Master was modified by this court by further order directing "that H. M. Butler, Master, do not take or state any account of the indebtedness of S. M. Felton, as Receiver, or calls for the claims of any creditors of the Receiver."

That within the time limited by said original order of February 20th, 1899, there were proved and filed with this master a number of claims for the respective amounts below stated.

The account of this Master (found on "Schedule—Exhibit A" below) was confined to demands which seemed or appeared

on the face of the claims, or accompanying papers therewith filed, to be within the specifications of the said modified order of this court of February 20th, 1899, viz: to "Claims and demands for material, supplies and labor, and other services rendered to the said Railroad Company within six months prior to the appointment of the said Receiver, and traffic balances with other railroad companies accruing within six months prior thereto." That is to say: "Schedule—Exhibit A" showed such claims as nearly as could be determined from the claims themselves without further evidence.

The "six months prior to the appointment of the said Receiver" extends from December 1st, 1896, to May 31st, 1897, both dated inclusive.

SCHEDULE—EXHIBIT A.

Being an account of the claims and demands filed, which, according to their face, appeared, on the first order of reference, to be for mat-rial, supplies, labor or other services against the C., S. & H. R. R. Company, rendered within six months prior to the appointment of the Receiver thereof, or traffic balances accruing within six months prior thereto, viz: Within said period from December 1st, 1896, to May 31st, 1897, both dates inclusive, and appeared to be called for by the modified order of February 20, 1899.

(For the Revised List as now found, under the Second Order of Reference of July 8th, 1899, see Part II of this report, "Schedule Exhibit A-1.")

145 (Among 240 claims of others the following:)

* * * * * * * * * * * * *

| No. of Claim. | | Amount of Principal. |
|---|---|---|
| 103, . . . . . | Gregg, W. S., Zanesville, O. . . . . | 6,804.49 |
| | * * * * * * * * * * * * * | |
| 2, . . . . . | Adams & Wettlake Co., Chicago, Ill. . . . | 325.82 |
| | * * * * * * * | |

## Part II. Six months' claims.

In response to so much of said order of reference as relates to claims for "Supplies, Labor or other Services," to the said Railroad Company furnished within the six months prior to the appointment of S. M. Felton, as receiver, and to "Traffic Balances" accruing within six months prior thereto, I would respectfully report.

That I have carefully examined and considered all the evidence submitted to me on behalf of and in opposition to said

claims, which said evidence is particularly described in Part III of this report and is herewith transmitted—and numerous arguments and authorities submitted by counsel and claimants. That upon the questions as to "The Amount" of such claims last above referred to; "The dates on which they accrued;" "The nature of consideration therefor," and "Whether any of said persons have a lien or preferential claim upon the property in the possession of S. M. Felton, as receiver," I first submit below a schedule which—because it is a corrected, and more detailed display and development of my formerly reported "Schedule—Exhibit A" above (see part I of this report, *ante*), I have marked "Schedule-Exhibit A-I."

In such "Schedule-Exhibit A-I" will be found: In column marked (1) the names of the persons and corporations presenting the claims, alphabetically arranged.

In column marked (2) the nature of the consideration for each of said claims respectively.

In column marked (3) the full amount of claim (exclusive of interest) alleged to be owing by the said Railroad Company to each of said claimants respectively.

In column marked (4) the time when each of said claims accrued, or originated respectively, i. e., the portion of each of said claims that originated within the six months period prior to the appointment of said S. M. Felton, as receiver.

In column marked (5) the portion of each claim, or item, respectively (exclusive of interest) which the master finds
146 originated within said six months period, but is not a claim for "Supplies, Labor or other Services," nor "for Traffic Balances within the meaning of said order, but was found upon some other and different consideration."

In column marked (6) the portion of each claim, or item, respectively (exclusive of interest) which the master finds originated within said six months period and is a claim for "Supplies, Labor and other Services," or "for Traffic Balances."

SCHEDULE—EXHIBIT A-I.

Column marked (1) shows, "Name of Claimant."

Column marked (2) shows, "Nature of consideration for Claim."

Column marked (3) shows, "Total Amount of Claim, exclusive of interests."

Column marked (4) shows, "Net Total of so much of claim, the original items of which accrued within six months prior to the appointment of S. M. Felton, as receiver of the Columbus, Sandusky & Hocking R. R. Co. (exclusive of interest)."

Column marked (5) shows, -Portion of Claim (exclusive of interest) which accrued within six months prior to the appointment of S. M. Felton, Receiver, but which the master, now finds on the evidence submitted, is not a claim for material, supplies or other services rendered to the Columbus, Sandusky & Hocking R. R. Co. nor a traffic balance with another rai*lroad company and not called for by* the order of Feb. 20th, 1899."

Column marked (6) shows, -Portion of Claim (exclusive of interest) which accrued within six months prior to the appointment of S. M. Felton as receiver, and which the master now finds on the evidence submitted, is a claim for material, supplies, labor or other services, rendered to the Columbus, Sandusky & Hocking R. R. Co., or is a traffic balance with another railroad company and called for by the modified order of Feb. 20th, 1899."

| Names. | Consideration. | Total Claim. | Portion within six months period. | Portion in six mo. rejected. | Total possible preferential Claim. |
|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 |
| Gregg, W. S. . . . . | Supplies. | $6804.49 | 6804.49 | | $6804.49 |
| * * * * * * * * * * * * * * * * * * * * | | | | | * * * * |
| Adams & Westlake Co. . | Supplies. | 424.53 | 424.53 | | 424.53 |
| * * * * * * * * * * * * * * * * * * * * | | | | | * * * * |
| | | | | (Total . | $99,105.88) |

147 Diversion of earnings.

In response to so much of Paragraph 2 of said Order of Reference as directs that the Special Master determine whether said persons who furnished Supplies, Labor and other Services to said Railroad Company, or hold Traffic Balances, accruing within six months prior to the appointment of said S. M. Felton, as receiver, thereof, the possession of the receiver of said Columbus, Sandusky & Hocking Railroad, I would respectfully report as follows:

The record shows that the usual six months' provision was made in the order appointing the receiver. Among the affidavits introduced for the purpose of proving a diversion of the earnings of said railroad within the six months' period prior to the appointment of said receiver, and the contrary, the affidavit of Frederic J. Picard avers, that from about November, 1895, to June 1st, 1897, when said receiver was appointed, he was a director of the defendant Railroad Company, and is so still at the date of his affidavit, August 24th, 1899.

That during said period and particularly the last six months prior to June 1, 1897, "said company diverted a large part of

its earnings to the payment of Car Trust Notes and obligations and other debts and obligations of the Columbus, Sandusky & Hocking Railroad Company, its predecessor company, and thus left unpaid a large part of its own operating expenses and debts and obligations incurred to keep the said company and its property a going concern and to preserve the integrity thereof; parts of which said operating expenses and debts and obligations are still outstanding and unpaid and entitled to be paid, as preferred debts of said Railroad Company."

The affidavit further particularized that said Railroad Company created and accumulated indebtedness of its own, to the amount of about $500,000 by failure to pay its own operating expenses to the amount of about $45,000 and by the diversion of about $455,600 of its earnings to the payment of Car Trust Notes and other obligations and indebtedness of its predecessor company, instead of applying its said earnings to the payment of its own unpaid debts and obligations, parts or all of which are entitled to be paid out of the earnings or *corpus* of said railroad property as preferred debts of said company.

The affidavit further particularizes and restricts as follows: That of said sum of $445,000 about the sum of
148 $270,000 was for said Car Trust Notes or obligations paid during said period as aforesaid; and "of said sum of $270,000 about the sum of $100,000 was paid during the six months next prior to the 1st day of June, 1897."

The averments further, are to the effect that "the said diversion of said earnings, and especially to that the payment of said Car Trust Notes or obligations was in the interest and directly inured to the said Metropolitan Trust Co., etc.," "in that, among other things, the payment of said Car Trust Notes or obligations released *pro tanto*, from the adverse claim of ownership of said cars and property by the holders of said Car Trust Notes or obligations, and from the lien and operation of the same, a large amount of the cars and property, operated and used by said Railroad Company; which cars and property, until said car notes or obligations were paid, remained subject to such adverse claim of ownership and to the lien and operation of the said Car Trust Notes or obligations, etc.

That the same, when and so far as said Car Trust Notes were paid, thereby became the cars of said Railroad Company and at once fell under the operation of the liens of complainants' mortgages.

That "said diversion of earnings for the benefit of said mortgages was of such an amount and of such character as would enable this court out of the amount thereof under the application of the six months' rule usually applied in such cases, to

cause to be paid all of the unpaid claims of said Railroad Company, the payment of which accrued within the six months next prior to June 1, 1897; or which are entitled to be paid under the usual application in such cases of said rule."

The affiant is unable for want of access to the records "to state with greater particularity or more on detail, the amount of the earnings of said Railroad Company during said period, and the purposes or objects to which the said earnings were devoted or applied;" he avers however, that "said Car Trust Notes paid by said diversion of earnings were a part of the entire amount of Car Trust Notes, or obligations, for the payment of the balance or other parts of which, receiver's certificates have been authorized and issued by orders of this court in this action."

The foregoing was filed "on behalf of the Zanesville Terminal Railway Company, the Columbus Terminal and Transfer Railroad Company, and other claims."

Further, on the same question, is an affidavit, sworn to by E. M. Fisher, now and since July 30, 1897, auditor
149 for the receiver, who says that he has had a wide experience as an expert in railroad accounts; is familiar with and has examined the books of the said Railroad Company for the eleven months ending June 1, 1897; that the books of the said company show gross earnings from operation of the said Railroad Company, for the said eleven months of $720,493.95; that during the paid period they show operatin- expenses of $621,395.87; taxes paid for the same period, $32,948.77; rents of yards, tracks and terminals for the same period $90,052.22. Showing for the said period, a deficit of $23,902.82.

Affiant further says, that the books of the Railroad Company show, that of the interest falling due upon the first mortgage bonds and first mortgage scrip October 1, 1896, there was paid by the said Railroad Company, in cash, by adjustment and otherwise, the sum of (not exceeding) $8,442.31.

The books and records of the company have also been introduced in evidence as bearing upon the question of Diversion of Earnings. (See transcript of same by E. M. Fisher, herewith transmitted.)

Without going into the detailed figures shown by such books and records, it will be sufficient to give the general results of an inspection thereof and the probably inevitable conclusions following.

I find from such inspection that said books show that within the six months' period prior to the appointment of S. M. Felton, as receiver, to wit, from December 1st, 1896, to June 1st,

1897, there were used, borrowed money to pay Car Trust Notes (presumably the Car Trust Notes mentioned in affidavit of F. J. Picard) to the amount of several thousand dollars. There were also some of said Car Trust Notes paid out of the earnings of said road during said six months' period, to the amount of several thousand dollars. All the rest of the earnings of said road during said six months' period appear by said records and books to have been used for the payment of operating expenses —current or old, unpaid operating expenses—except some interest on coupon and real estate notes. These, if they have any lien, it does not seem to be attempted to displace.

The above is a description of all the evidence presented to the Special Master upon said subject of Diversion of Earnings. (For such evidence and where to be found in files of this Reference, see Part III of this Report, *post.*)

The payment of $8,442.31 for interest on bonds, men-
150 tioned by Mr. Fisher, in his said affidavit, occurred more than six months prior to said receivership.

I find, as a conclusion of law, that to entitle the claims known as claims for "Supplies, Labor, Services and Traffic Balances," to a lien or Preferential Claim upon the *corpus* of the Railroad Property, and to displace contract liens prior thereto in point of time, such claimants must prove what the courts of the United States recognize as a Diversion of Earnings, during a fixed period prior to the taking of the railroad property by the court.

That the necessity for charging such debts upon the *corpus* of the property can only arise when the income before or after the receivership has been applied directly to the beneficial purposes of the mortgage debt displaced.

(Thomas *vs.* Western Car Co., 149 U. S. 95.)

That the burden of causing such Diversion affirmatively to appear is on such claimants.

The extent of displacement is commensurate with the amount of the Diversion.

(International Trust Co., trustee, *vs.* The Townsend, etc., Co., U. S. Circuit Court of Appeals, 6th Circuit, July 5, 1899.)

The alleged Diversion consisted, in this instance, in paying Car Trust Notes and old operating expenses on which said Railroad Company was obligated. If this does not amount *of* a Diversion then none, according to the evidence, took place in this instance.

The payment of any operating expenses, old or new, out of the earnings, it will be conceded, is not a Diversion in favor of any one nor to the prejudice of any one. It is to the payment of operating expenses that the earnings fund is first applicable.

Is the payment of Car Trust Notes, or obligations, whether to release liens on cars or to complete the purchase of the same, such a Diversion?

Cars are a necessary supply to keep a railroad a "going concern." Without cars there could be no earnings from a railroad. To say (in respect to a railroad) that the purchase or release of cars whether engines, passenger or freight cars, is a Diversion of earnings, away from what ought to be first paid therewith, would be to say that the purchase of shop supplies, office supplies, or any other kind of necessary railroad supplies, is a Diversion.

There are very many claims among those above in
151 column 6 of "Schedule-Exhibit A-I," whose claims are for not nearly so necessary supplies as cars. One of the said claimants, on whose behalf F. J. Picard's said affidavit is filed, presents a claim for some $17,000 for locomotives, as a preferential claim for supplies. It would seem that any necessary cars were no less "supplies" than locomotive cars.

A "Diversion" consisting merely in the use of earnings to pay for, or to release from incumbrance, cars, was a Diversion in favor, primarily, of these very claimants who hold these six months' claims, rather than in favor of the mortgage bonds. For without cars, the ability of the railroad to earn anything at all, towards paying these six months' claims, would have to come to an end. On the other hand, mortgage bonds of the road are only indirectly benefited by the purchase, or release of cars. They have the *corpus* to look to, if all cars should vanish.

A payment out of earnings, which enhances the value of prior contract liens only so far as equipment is concerned, is not diversion and does not displace such prior contract liens. (St. Louis Ry. Co. *vs.* Cleveland Ry. Co., 125 U. S. 658, 677.) (*In re* Claim of Zanesville Terminal Ry. Co., opinion of the court in this case.)

I therefore find that there was no diversion of earnings by said Columbus, Sandusky & Hocking Railroad Company, within six months prior to the appointment of S. M. Felton, as receiver of this court.

That said foregoing claims and items found in column marked "6" of "Schedule-Exhibit A-I," of this report, are not liens or preferential claims upon the *corpus* of the property in the possession of the receiver of this court, and none of the said claimants have any such lien or preferential claim upon the *corpus* of said property, but all may look for payment to the earnings of said railroad only.

And afterwards, to wit, on the 2d day of October, A. D. 1899, came Winfield S. Gregg, by his solicitors, and filed in the clerk's office of said court his certain exceptions to Master's Report in this cause, which said exceptions are clothed in the words and figures following, to wit:

152 *Exceptions to Master's Report.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST COMPANY OF NEW YORK, Complainant, *vs.* THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, *et al.*, Defendants. } No. 887.

Consolidated Cause.

Exceptions to the special master's report.

WINFIELD S. GREGG, the intervening petitioner herein, now comes and excepts to the Special Master's report, filed herein on the 25th day of September, 1899, in this, to wit:

1. To the finding of said Special Master's report as shown in Schedule A-2, that said Winfield S. Gregg does not claim interest on the amount of his claim for supplies, materials, &c., which accrued within six months prior to the appointment of the receiver herein and which is allowed and reported by the Master as shown in Schedule A-1, when, as appears from the record, stipulation and evidence herein, said Winfield S. Gregg claims interest on $4,709.53 from the 25th day of June, 1897, at the rate of six (6) per cent. per annum; on $394.96 from the 12th day of May, 1897, at the rate of seven (7) per cent. per annum, and on $1,700.00 from the 25th day of May, 1897, at the rate or seven per cent. per annum.

2. To the findings and conclusion of law of said Special Master as shown in said report that, to entitle the claims known as claims for supplies, labor, services and traffic balances to a lien or preferential claim upon the *corpus* of the railroad property, &c., a diversion of earnings must be proved during a fixed period prior to the taking of the railroad property by the court and that such debts can only be charged upon the *corpus* of the property if the income before or after the receivership has been applied directly to the beneficial purposes of the mortgage debt displaced.

3. To the finding and conclusion of said Special Master that the claims shown in the column marked 6 of Schedule
153 A-1 of said report, of which the claim of the said Winfield S. Gregg is one, are not liens or preferential claims upon the *corpus* of the property in possession of the receiver of the court and that none of such claimants has any such lien or preferential claim upon the *corpus* of said property but that all may look for payment to the earnings of the said railroad only.

4. To the said report in other respects as not being in accordance with the law and the evidence.

C. T. MARSHALL,
CLEVELAND & BOWLER,
*Attorneys for Winfield S. Gregg.*

And afterwards, to wit, on the 7th day of October, A. D. 1899, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following:

Entry D—286.

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST COMPANY OF New York, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants.
} No. 887. Order.

Upon application of the complainant, it is ordered that the time for filing exceptions with the clerk of this court to the report of Henry M. Butler, Special Master, filed on September 25, 1899, be and the same hereby is extended so that exceptions to said report may be filed with the clerk of this court by any of the claimants affected thereby, on or before October 25, 1899.

It is further ordered that said exceptions be heard by the court at Cincinnati, November 10 and 11, 1899, and that at the same time and place will be heard the motion for leave to file the intervening petition of John G. Carlisle, *et al.*, and any and all other matters heretofore set for hearing on said October 12th and 13th.

And it is further ordered that written notice of this order be mailed by said special master to each of the
154 parties in this cause, and each of the parties who have filed claims with said master, or their respective solicitors.

And afterwards, to wit, on the 9th day of March, A. D. 1900, the following further amendments to bill of complaint was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Further Amendments to Bill of Complaint.*

Filed by leave of court.

United States Circuit Court, Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY OF THE City of New York, Trustee, Complainant,
*against*
THE COLUMBUS, SANDUSKY AND HOCKING Railroad Company and others.
} Consolidated Cause. In Equity. No. 887.

To the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

The Metropolitan Trust Company of the City of New York, as trustee and in its individual right, by leave of court, further amends its bill of complaint herein as follows:

First. By omitting from the title of the said bill and of this cause the words "and in its individual right," so that the title of this cause shall read "Metropolitan Trust Company of the City of New York, trustee, *against* the Columbus, Sandusky and Hocking Railroad Company," etc.

Second. By omitting from paragraph XVIII of the said bill of complaint certain allegations therein, so that the said paragraph XVIII shall, after the said omissions, read as follows:

"XVIII. Your orator is the successor in interest of the Columbus, Sandusky & Hocking Railway Company, a corporation organized under the laws of Ohio on January 21, 1894, by the consolidation of the Columbus, Shawnee & Hocking Railway Company and the Sandusky & Columbus Short Line
135 Railway Company; that on July 5, 1895, the said Columbus, Sandusky & Hocking Railway Company, having defaulted its interest on certain of its mortgage deeds of trust outstanding, a suit was filed in the Crawford County, Ohio, Court of Common Pleas, entitled the Metropolitan Trust Company, *v.* The Columbus, Sandusky & Hocking Railway Company, seeking a foreclosure of the said mortgages and a sale of the right of way, real estate, personal property and rolling stock of the said Railway Company; that the said railroad

property thus foreclosed was as to the right of way and real estate in all respects the same, and as to the rolling stock substantially the same as that subsequently conveyed to the Columbus, Sandusky & Hocking Railroad Company, and thereafter conveyed by the said Railroad Company by way of mortgage as aforesaid to your orator; that in the foreclosure suit as aforesaid, by order of July 28, 1895, $250,000 of receiver's certificates were authorized to be issued by Nicholas Monsarrat, the receiver theretofore appointed in said suit, which certificates were decreed to be a lien upon the aforesaid property of the Railroad Company superior to and prior to that of all other liens whatever; that on October 7, 1895, a further order was made in the said suit authorizing the said receiver to issue $250,000 additional receiver's certificates, which should likewise be a lien upon all the property as aforesaid of the said Railway Company equal to the lien of the receiver's certificates theretofore authorized and above referred to, and prior and superior to all other liens whatsoever; that by virtue of the said orders, the said receiver issued at the various times thereafter, receiver's certificates to the extent of $500,000, which said certificates were purchased for value and are now outstanding, and that $250,000 thereof are held by the defendant, F. G. Hallett, and that the other $250,000 thereof are held by your petitioner; that the said Columbus Sandusky & Hocking Railway Company is wholly insolvent and no longer exists as a corporation, and that the Columbus, Sandusky & Hocking Railroad Company is likewise absolutely insolvent.

Third. By omitting from the prayer of the said bill of complaint sub-division 2 and 3 thereof.

Fourth. By omitting from sub-division 4 of the said prayer these words, "to the prior liens of itself and F. G. Hallett, as sole holders of the Monsarrat receiver's certificates above referred to."

Fifth. By omitting from sub-division 6 of the said
156 prayer the following words: "In its individual right and."

Sixth. By omitting from sub-division 7 of the said prayer the words "in its individual right or."

Seventh. And by addng to the said prayer a sub-division 12, reading as follows:

"(12) That the Metropolitan Trust Company, in its individual right, have leave, by intervening petition or otherwise, to assert the claim or lien, if any, which it have by reason of

its being the holder of $250,000 of the Monsarrat receiver's certificates as hereinbefore set forth."

[SEAL.] METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
By BRAYTON IVES, *President.*

Attest:
BEVERLY CHEW, *Secretary.*

PARSONS, SHEPARD & OGDEN,
*Solicitors for Metropolitan Trust Co.*

STATE OF NEW YORK,
*County of New York, Southern District of New York,* } *ss*:

BRAYTON IVES, being duly sworn, says: I am the president of the Metropolitan Trust Company of the city of New York, the above-named complainant. I have read the foregoing amendments to its bill of complaint, and know the contents thereof. The same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

BRAYTON IVES.

Sworn to and subscribed before me, this 18th day of January, 1900.

[N. S.] J. C. KLINCK,
*Notary Public in and for Kings County, N. Y.*

Cert. filed in New York County.

And afterwards, to wit, on the 9th day of March, A. D. 1900, an entry was made upon the Journal of said court in said cause, clothed in the words and figures following, to wit:

157 Entry D—404.

It is ordered that Joseph Robinson, appointed receiver herein as successor to S. M. Felton, be and he is hereby substituted as party defendant to the intervening petition of Winfield S. Gregg in place of said S. M. Felton, receiver.

And afterwards, to wit, on the 9th day of March, A. D. 1900, came to the parties, by their solicitors, and filed in the clerk's office of said court their certain stipulation in this cause, which said stipulation is clothed in the words and figures following, to wit:

*Stipulation.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST CO. OF THE CITY OF New York, a corporation, etc., Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, a corporation, etc., *et al.* Defendants.

No. 887. Consolidated Cause.

Stipulation upon the intervening petition of Winfield S. Gregg.

The intervening petitioner, Winfield S. Gregg, and the Mercantile Trust Company of New York, and the Metropolitan Trust Company of the city of New York, complainants in the cases heretofore consolidated and proceeding as above entitled, and Joseph Robinson, receiver herein, and the parties hereto, do hereby stipulate that for the purpose of a hearing, trial and disposition of the questions raised by the intervening petition of Winfield S. Gregg, heretofore filed herein, that the following facts may be taken and are agreed to be true.

In addition to the facts which appear of record in the above entitled cause and in the record in Case No. 816 on the docket of this court, wherein the Mercantile Trust Company, Trustee, is complainant, and the Columbus, Sandusky & Hocking Railroad Company and others are defendants, it is agreed as

First. That on the first day of December, 1896, Winfield S. Gregg, intervenor, duly entered into a contract
158 with the Columbus, Sandusky & Hocking Railroad Company, a copy of which is hereto attached and made a part hereof and marked Exhibit A.

That in pursuance of said contract the said Winfield S. Gregg sold and delivered in the month of May, and on the first, second and third days of June, 1897, to the said Columbus, Sandusky & Hocking Railroad Company, ties to the number and of the value following:

| | |
|---|---|
| 9115 Ties, 6 x 9, at 33 cts. each ..... | $3463 70 |
| 955 Ties, 6 x 9, at 19 cts. each ..... | 181 45 |
| 2804 Ties, 6 x 9, at 35 cts. each ..... | 981 40 |
| 461 Ties, 6 x 8, at 18 cts. each ..... | 82 98 |
| | $4709 53 |

for which amount said Gregg made a bill against said company dated May 31, 1897, which said amount, under the terms of said contract, became and accrued due and payable to said Winfield S. Gregg on the 25th day of June, 1897, and it is still due and unpaid.

That an inventory taken by the receiver herein on the 10th day of June, 1897, showed that of the ties so sold and delivered, as aforesaid, there were on hand upon said date ties to the amount and value of $3,200.00, which said receiver has since used in the operation and maintenance of said railroad as a going concern.

That said account for $4,709.53 was duly presented to the said receiver as a claim against said company in said amount, and was allowed by said receiver as per the following certificates:

"This is to certify that Winfield S. Gregg has filed with me a claim against the Columbus, Sandusky & Hocking Railroad Company for the sum of $4,709.53 for material furnished by him to said company, and that I have allowed the same as a claim which accrued due within six months prior to the appointment of S. M. Felton, receiver of said company.

(Signed) E. M. FISHER,
*Auditor for the Rec'r.*

That said claim is a claim for materials and supplies, and was necessarily incurred and grew out of the operation and maintenance of said railroad as a going concern from day to day, and was a necessary operating expense in keeping and using said railroad and preserving said property in a fit and safe condition as such.

159 That the roadmaster of said railroad had, in the fall of 1896, made requisition on the company for from 80,000 to 90,000 ties as being necessary to put said road in a safe and proper condition, but that the said company had contracted for only 35,000 ties under the contract heretofore referred to and attached hereto as Exhibit A.

Second. The notes set out in said intervening petition of Winfield S. Gregg, copies of which are attached to the same, are genuine and valid obligations of said Railroad Company and are due and unpaid and represent an indebtedness for materials and supplies sold and delivered to and labor performed for the said Columbus, Sandusky & Hocking Railroad Company as follows:

The notes dated May 25th, 1897, represented the following:

March 25th, 1897, $71.50, piling shipped to Sandusky.

March 27th, 1897, $98.75, shop lumber for repair of cars.

March 31st, 1897, $81.25, piling shipped to Sandusky.

March 31st, 1897, $1873.29, ties furnished in March.

April 12th, 1897, $53.75, switch ties shipped to Drake's Siding.

April 17th, 1897, $81.25, piling shipped to Sandusky.

April 20th, 1897, $53.75, switch ties shipped to Drake's Siding.

April 22nd, 1897, $58.50, piling shipped to Sandusky.

April 12th, 1897, $128.20, shop lumber for repair of cars.

Total, $2500.24, less $500.24 (cash paid to Winfield S. Gregg, May 25, 1897).

Balance, $2000.00, for which six notes dated May 25th, 1897, of said Railroad Company in favor of said Winfield S. Gregg were given, less $300.00, one of said six notes paid by S. M. Felton, receiver. Balance, $1,700.00, being the five remaining notes dated May 25th, 1897, unpaid and set out in said intervening petition.

The first four items, namely, those under date of March, 1897, accrued due April 25th, 1897, and the last five items, to wit, those under date of April, 1897, accrued due May 25th, 1897.

The notes dated May 12th, 1897, represent the following:

Feb. 22nd, 1897, $122.44, shop lumber for repair of cars.

160 Feb. 28th, 1897, $155.68, grading at Congo, $172.37, less 10 per cent.

Mar. 1st, 1897, $62.90, ties, $2462.90, less $2400.00 paid in cash.

Mar. 16th, 1897, -54.47, switch ties shipped to Bellevue, -80.62, less $26.15 is deducted for inspection.

Total, $395.49, error 53 cts.

Balance $394.96, for which two notes dated May 12th, 1897, of said Railroad Company in favor of Winfield S. Gregg were taken and are the two notes of date May 12th, 1897, set out in said intervening petition.

The first three items, which are represented by said notes dated May 12th, 1897, accrued due March 25th, 1897, and the last item accrued due April 25th, 1897.

The claim arising on and represented by all of said notes of date May 12th, 1897, and May 25th, 1897, respectively, is a claim for materials and supplies and work and labor done as above specified, and was necessarily incurred and grew out of the operation and maintenance of said railroad as a going concern, from day to day, and was a necessary operating expense in keeping and using said railroad and preserving said property in a fit and safe condition as such. All of said materials and supplies were furnished within six months prior to the ap-

pointment of the receiver herein, and accrued due less than six months prior to the date of the appointment of said receiver herein.

Third. That all the ties represented by said notes, as well as the open account above mentioned in paragraph- one and two hereof, were furnished under said contract of December 1st, 1896, hereto attached, marked Exhibit A, and the other items entering into said notes were furnished under special contract from time to time on the dates above specified for the particular items.

The intervening petition is submitted upon the question whether Winfield S. Gregg is entitled to a lien upon the *corpus* of the property, or of the proceeds of the sale thereof, prior to the bonds represented by the Mercantile Trust Company of New York and the Metropolitan Trust Company of New York, and the claim against S. M. Felton, receiver, as an operating expense of his receivership for the ties taken up by him June 2nd and 3rd, after his appointment amounting to $863.39, part of $4709.53 aforesaid, is withdrawn, but it is understood that the decree to be entered shall be without prejudice to any claim said Gregg may have to be paid as a six months' claimant
161 out of surplus earnings, if any, of the receivership or as other six months' claimants may be paid.

LAWRENCE MAXWELL, JR.,
*Counsel for Robinson, Receiver.*
ALEXANDER & GREEN,
*Solicitor for Mercantile Trust Co.*
CLEVELAND & BOWLER,
*Solicitor for W. F. Gregg.*
MORRISON R. WAITE,
*Solicitor for Metropolitan Trust Co.*

Articles of agreement made and entered this 1st day of December, 1896, by and between W. S. Gregg, of the city of Zanesville, Ohio, party of the first part, and the Columbus, Sandusky & Hocking Railway Company, a corporation of the State of Ohio, party of the second part, witnesseth:

That for and in consideration of the payments and covenants hereinafter mentioned, to be made and performed by said second party, the said first party hereby agrees to furnish all material, and to finish in the most workmanlike manner and to the satisfaction of the roadmaster of the second part, thirty-five thousand (35,000) cross ties, in accordance with the following specifications:

**Specifications for cross ties.**

The ties must be of white oak, burr oak, chestnut oak, wild cherry, black walnut or other timber of a suitable character approved by the roadmaster. They must be cut from sound, live trees, and be free from rotten or loose knots, worm eaten, dry rot, wind shakes, or other imperfections affecting the durability of the wood.

6 x 8 sawed ties will be exactly eight (8) feet long, not less than nine (9) inches square on either side, and six (6) inches in thickness. 6 x 8 sawed ties will be exactly eight (8) feet long, not less than eight (8) inches surface on either side and six (6) inches in thickness. Not more than one inch of sap will be allowed on the face of sawed ties. 6 x 9 hewed ties must be exactly eight (8) feet long and carefully hewn in a workmanlike manner, barked and cleared of wind on both parallel sides so as to give not less than eight (8) inches surface on either side their entire length, and to be six (6) inches in thickness. The cases must be cut square at the ends and be straight in all directions. 6 x 8 hewed ties must be exactly eight feet long, and carefully hewn in a work-
162 manlike manner, marked, and clear of wind on both parallel sides, so as to give not less than seven (7) inches surface on either side their entire length, and to be six (6) inches in thickness. The faces must be cut square at the ends and be straight in all directions. At the contract price, ties to be delivered on board cars as directed by the roadmaster. All ties that, in the opinion of the roadmaster, fall short of these specifications as to quality, size, etc., shall be rejected, and it shall be the duty of the contractor to remove at once such rejected ties from the company's ground, as the railroad will not be responsible for their safe keeping in any manner whatsoever.

Said cross ties shall be delivered on board cars on this road, and all delivery of same shall be completed on or before the first day of ———, 1897.

It being expressly agreed that the time herein stipulated shall be the essence of this contract.

It being further agreed that the percentage of sawed ties furnished shall not be over fifty per cent. of the gross number, and it being further agreed that of the gross number, one-third shall be 6 x 8 x 8 ties, and two-thirds shall be 6 x 9 x 8 ties.

In consideration for which the said second party agrees to pay to the first party for each of said ties so delivered and accepted the following prices.

For first class 6 x 9 x 8 ties, thirty-eight cents.

For second class 6 x 9 x 8 ties, nineteen cents.

For first class 6 x 8 x 8 ties, thirty-five cents.

For second class 6 x 8 x 8 ties, eighteen cents.

The said payment for said cross ties is to be made in manner as follows:

During the progress of said work, and until its completion, on or before the first day of each month, there shall be made an estimate of the character, quality and value of the cross ties delivered and accepted during the preceding month and said estimate shall be paid to the first party on or before the twenty-fifth day of the month, and whenever the work is completed and accepted, there shall be a final estimate made by the roadmaster and the balance due the first party, after deducting the monthly payments, and upon giving release to the second party from all claims and demands, whatsoever, will be paid in full.

It is agreed that the first of the estimates hereinabove mentioned shall be made on the first day of March, 1897, and payment of the same to be made on the 25th day of March,
163 1897, monthly estimates and payments to be made on the first and twenty-fifth days of each month respectively until the work is fully completed and ended. It is further agreed that no one month's estimate shall exceed four thousand two hundred and eighty-five (4285) 6 x 8 x 8 ties and five thousand seven hundred and fifteen (5715) ties.

The second party, should they deem it proper, may before paying any monthly or final estimates, first pay any claims for labor or material furnished and properly chargeable to the work herein contracted for, and deduct the amounts from said estimates before monthly or final settlement with the party of the first part for the same. Said first party shall not transfer this contract or withdraw his personal attention therefrom without the written consent of the said second party.

It is further agreed that, after the above contract shall have been fully completed, should the said second party during the year 1897, need any additional cross-ties, the said first party shall have the privilege of furnishing the same to the said second party under the same conditions and for the same prices as are contained and stipulated above, estimates and payments for such additional cross-ties to be made on the first and twenty-fifth days respectively of the month following in which such additional ties are delivered; delivery of such additional cross-ties to be made by said first party within sixty days after receipt or written notice from said second party of the number and kind needed, and acceptance or rejection of such order for such additional cross-ties is to be made in writing to the roadmaster of said railroad by said first party, within ten days after

the receipt by said first party of such written notice from said second party, as aforesaid; rejection by said party of any one order from said second party for such additional cross-ties as may be needed, shall be considered as a rejection as a whole, and the same may be declared null and void, at the option of said second party.

In witness whereof, the parties hereto have hereunto set their hands, and caused the same to be signed in duplicate the day and year first hereinabove written.

W. S. GREGG.
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD COMPANY.
By W. E. GUERIN, *President.*

Witness:
E. L. McCUNE.
W. H. MAUTZ,
As to W. E. Guerin.

164 And afterwards, to wit, on the 10th day of March, A. D. 1900, a decree was entered upon the journal of said court in said cause, which said decree is clothed in the words and figures following, to wit:

*Decree.*

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, as Trustee, Complainant,
*against*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD Company and others, Defendants.

THE MERCANTILE TRUST COMPANY OF NEW York, as Trustee, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING Railroad Company, Defendant.

In Equity.
Consolidated Cause. No. 887.

This consolidated cause having come on to be heard at this term and the defendant railroad company having been duly served with subpœnas to answer the original bill of The Mercantile Trust Company of New York, as trustee, and the ancil-

lary and dependent bill of the Metropolitan Trust Company of the City of New York, as trustee, and having appeared by counsel and by the answers admitted the allegations of said original bill, and said ancillary and dependent bill, and having consented by counsel in open court to this decree; and various intervening petitions having come on to be heard, and issues raised thereon and upon the pleadings, and various matters having been referred to H. M. Butler, Master, for his findings of fact and conclusions of law; and the said master having filed his report herein dated Sept. 25, 1899, and the exceptions of parties interested therein to the findings of fact and con-
165 clusions of law having been filed, and the said exceptions having come on to be heard; thereupon upon consideration of all thereof, it is ordered, adjudged and decreed as follows:

I. That all and singular the material allegations in the bill of complaint in the Mercantile Trust Company, Trustee, filed June 2d, 1897, and in the dependent and ancillary bill of the Metropolitan Trust Company of the City of New York, as trustee, filed originally October 24th, 1898, as amended by amendments filed February 23, 1899, March 10, 1899, June 7, 1899, August 7, 1899, and March 9th, 1900, are true, except as hereinafter found.

II. That on or about the 9th day of November, 1895, the defendant, The Columbus, Sandusky & Hocking Railroad Company (hereinafter called the "Railroad Company") duly made and executed a certain mortgage or deed of trust (hereinafter called the Prior Lien Mortgage) bearing date on that day and therein and thereby conveyed to the Mercantile Trust Company, as trustee, all its property, both real, personal and mixed, then by it owned or thereafter to be by it acquired to secure certain bonds of the said defendant Railroad Company by it to be issued, as in said mortgage or deed of trust provided. Which said mortgage was duly recorded in the office of the recorder of deeds in each of the counties in which any of the real or personal property was and is situated or employed.

III. That said defendant Railroad Company under and in accordance with the provisions of the said prior lien mortgage made, executed and delivered and said the Mercantile Trust Company in the manner therein provided certified, and said defendant railroad company duly issued two million dollars par value of its bonds, as therein provided, in and by each of which said bonds said defendant railroad company acknowledged itself indebted to the holder thereof in the sum of one thousand dollars in gold coin of the United States of the then standard of weight and fineness, and each of which said bonds

said defendant railroad company promised to pay on the 1st day of October, 1900, with interest thereon in the meantime at the rate of five per centum per annum, payable semi-annually on the 1st days of April and October in each year.

That all of such bonds at the time of the filing of said bill of complaint had been duly certified by the trustee and delivered to the defendant railroad company for negotiation and issue. That said bonds are two thousand in number,
166 numbered from one to two thousand, both inclusive and that one million two hundred thousand dollars ($1,200,000) par value thereof (numbered from 1 to 1200, both inclusive) have been negotiated for value to a large number of persons who are now the lawful holders and owners thereof, and that eight hundred thousand dollars ($800,000) par value thereof, numbered from 1201 to 2000, both inclusive, have never been sold absolutely, but were issued and are held in trust to satisfy certain scrip to the amount of eight hundred thousand ($800,000) dollars deposited with the clerk of the Common Pleas Court of the county of Crawford, in the State of Ohio.

IV. That at the time of filing said bill of complaint on the second day of June, 1897, interest evidenced by interest warrants or coupons to the amount of eighty-five thousand six hundred and sixty-six and 67-100 dollars ($85,666.67) which matured prior to June 2nd, 1897, on said bonds was unpaid. That after maturity of said interest, demand was made for the payment of the same; that said defendant railroad company made default in the payment thereof and that the whole amount thereof remains due and unpaid and in default.

That the following sums are now due and payable on the date of this decree for interest on the said bonds secured by the said prior lien mortgage, viz:

| | |
|---|---|
| Interest evidenced by interest warrants or coupons on said eight hundred (800) bonds last mentioned, due April 1st, 1896 | $15,666.67 |
| Interest thereon from April 1, 1896, to date of decree | 3,707.79 |
| Interest evidenced by interest warrants or coupons on said eight hundred (800) bonds last mentioned due October 1st, 1896 | 20,000.00 |
| Interest thereon from October 1, 1896, to date of decree | 4,133.33 |
| Interest evidenced by interest warrants or coupons due April 1st, 1897 | 50,000.00 |
| Interest thereon from April 1, 1897, to date of decree | 8,333.33 |

| | |
|---|---|
| Interest as evidenced by interest warrants or coupons due October 1, 1897 | 50,000.00 |
| Interest thereon from October 1, 1897, to date of decree | 7,333.33 |
| Interest as evidenced by interest warrants or coupons due April 1, 1898 | 50,000.00 |
| Interest thereon from April 1, 1898, to date of decree | 5,833.33 |
| 167 Interest evidenced by interest warrants or coupons due October 1, 1898 | 50,000.00 |
| Interest thereon from October 1, 1898, to date of decree | 4,333.33 |
| Interest as evidenced by interest warrants or coupons due April 1st, 1899 | 50,000.00 |
| Interest thereon from April 1, 1899, to date of decree | 2,833.33 |
| Interest as evidenced by interest warrants or coupons due October 1, 1899 | 50,000.00 |
| Interest thereon from October 1, 1899, to date of decree | 1,333.33 |
| Interest upon the principal of the said bonds from October 1, 1899, to date of decree | 44,444.44 |
| Total | $418,452.21 |

V. That said prior lien mortgage is a valid and subsisting lien to secure the payment of the principal and interest of said bonds upon all the property of the defendant railroad company, both real, personal and mixed, as described in said mort-age, to wit, all and singular the railroad of the said defendant railroad company, its lands, tenements and hereditaments, rights of way, fixtures, buildings, bridges, piers, docks, wharves, fences, structures, railways, ties, locomotives, tenders, engines, cars, carriages, equipment, machinery, tools, implements, materials, chattels, franchises, privileges, rights, interest, telegraph lines, rents, toll, income, revenue, resources, reservations, benefits, investments, leases, contracts, assets and estate, legal and equitable which were by it owned on the said 9th day of November, 1895, or since then have been by it acquired or which in any way belong or appertain to its said railroad.

VI. That on or about the 11th day of November, 1895, the defendant railroad company duly made and executed its certain mortgage or deed of trust (hereinafter called the "gen-ertal mortgage"), bearing date on that day, and therein and thereby conveyed to the Metropolitan Trust Company of the city of New York, as trustee, all its property, both real, per-

sonal and mixed, then by it owned or thereafter to be by it acquired, to secure certain bonds of said defendant railroad company by it to be issued, as in said mortgage or deed of trust provided. Which said mortgage was duly recorded in the office of the recorder of deeds in each of the counties in which any of the real or personal property was and is situated or employed.

168 VII. That said defendant railroad company under and in accordance with the provisions of said general mortgage made, executed and delivered and said Metropolitan Trust Company of the City of New York, as trustee, in the manner therein provided certified and said defendant railroad company duly issued seven million four hundred and fifty-six thousand dollars ($7,456,000) par value of its said bonds, as therein provided, in and by each of which bonds said defendant railroad company acknowledged itself indebted to the holder thereof in the sum of one thousand dollars ($1,000) in gold coin of the United States of the then standard of weight and fineness and each of which bonds said defendant railroad company promised to pay on the first day of January, 1946, with interest thereon in the meantime at the rate of 2 1-2 per centum from January 1st, 1896, to January 1st, 1898, and at the rate of 3 per centum per annum from January 1st, 1898, to January 1st, 1900, and at the rate of 4 per centum per annum thereafter, payable semi-annually on the first days of July and January in each year.

VIII. That the said seven million four hundred and fifty-six thousand dollars ($7,456,000) of such bonds were at the time of the filing of said dependent and ancillary bill on the 24th day of October, 1898, and now are outstanding and valid obligations of said defendant railroad company. That said bonds consist of seven thousand four hundred and fifty-six (7,456) bonds, numbered from two thousand five hundred and forty-four to ten thousand, both inclusive, and that the same have been negotiated, sold and delivered for value to a large number of persons, who are now the lawful owners and holders thereof.

IX. That at the time of the filing of the said dependent and ancillary bill on said October 24th, 1898, interest as evidenced by interest warrants which matured prior to said October 24th, 1898, on said bonds amounting to two hundred and ninety-eight thousand two hundred and forty dollars ($298,240) was unpaid. That on the 1st of July, 1897, on the 1st day of January, 1898, and on the 1st day of July, 1898, there became due and payable upon said bonds semi-annual installments of interest, but said defendant railroad company made default in the payment thereof and the whole amount remains due and

unpaid and in default. That the following sums are now due and payable on the date of the decree for interest on the said bonds, secured by the said general mortgage, viz.:

| | | |
|---|---|---|
| 169 | Interest as evidenced by interest warrants or coupons due July 1st, 1898 | $93,200.00 |
| | Interest as evidenced by interest warrants or coupons due January 1st, 1898 | 93,200.00 |
| | Interest as evidenced by interest warrants or coupons due July 1st, 1898 | 111,840.00 |
| | Interest as evidenced by interest warrants or coupons due January 1st, 1899 | 111,840.00 |
| | Interest as evidenced by interest warrants or coupons due July 1st, 1899 | 111,840.00 |
| | Interest as evidenced by interest warrants or coupons due January 1st, 1900 | 111,840.00 |
| | Interest thereon from January 1st, 1900, to date of decree | 57,991.11 |
| | Total | $691,751.11 |

X. That said general mortgage is a valid and subsisting lien subject to said prior lien mortgage to secure the payment of the principal and interest of said bonds upon all the property of the defendant railroad company, both real, personal and mixed, as described in said mortgage, to-wit, all and singular the railroad of said defendant railroad company, its lands, tenements, and hereditaments, leases with other railroad companies, rights of way, fixtures, buildings, ties, bridges, piers, fences, structures, railways, railway yards, sidings, locomotives, tenders, engines, cars, carriages, equipment, machinery, tools, implements, materials, docks, wharves, chattels, franchises, privileges, rights, interest, telegraph lines, rents, tolls, incomes, revenues, resources, reservations, benefits, investments, assets and estate, legal and equitable of every kind and character, which on the said 11th day of November, 1895, were by said defendant railroad company owned, or since then have been by it acquired, or which in any way belong or appertain to its said railroad.

XI. That the said defendant railroad company owns, having acquired the same either through its own purchases or those of its receivers, and there are subject to the Felton and Robinson certificates hereinafter described and to the aforesaid prior lien and general mortgages, and are to pass by virtue of the sale in this cause, properties not immediately a part of the right of way as follows:

(1) A tract of land lying in the county of Erie and city of Sandusky, composed of water lots 81 to 85, inclusive, being the same originally conveyed to S. M. Felton, as receiver of The Columbus, Sandusky & Hocking Railroad Company by Rolin B. Hubbard, October 7, 1897.

(2) A tract of land containing 379-1000 acres in the county of Sandusky, York township, being that part of the west half of the southeast quarter of section 36, township 4, range 17, conveyed to S. M. Felton, as receiver of The Columbus, Sandusky & Hocking Railroad Company by George M. Kinney, January 19, 1897.

(3) A tract of land containing 4 acres in the county of Sandusky, York township, adjoining the land of T. C. Wood, conveyed to S. M. Felton, receiver of the Columbus, Sandusky & Hocking Railroad Company by Thomas C. Wood, January 19, 1897, subject to the right of way reserved to T. C. Wood, his heirs and assigns by said conveyance.

(4) A tract of land in the county of Crawford, city of Bucyrus, composed of in-lot 1411, conveyed to The Sandusky & Columbus Short Line Railway Company under condemnation proceedings against T. C. Hall, July 19, 1892, in the Probate Court of Crawford county, Ohio.

(5) A tract of land in the county of Crawford, city of Bucyrus, being that part of subdivision B, outlot 110, conveyed to The Sandusky & Columbus Short Line Railway Company by Frederick J. Picard, September 19th, 1893.

(6) A tract of land being in-lot 184, acquired by the Sandusky & Columbus Short Line Railway Company, condemnation proceedings against P. Metzger, in Probate Court of Crawford county, Ohio, September 27, 1892.

(7) A tract of land in the county of Crawford, city of Bucyrus, composed of in-lots 1553 and 1564, inclusive, of Frederick J. Picard's subdivision of out-lot 217, revised numbers out-lots in the city of Bucyrus, conveyed to The Sandusky & Columbus Short Line Railroad Company, April 8, 1893, and The Columbus, Sandusky & Hocking Railroad Company, June 6, 1898.

(8) A tract of land containing 11 35-100 acres more or less in the county of Marion and city of Marion, being that part of the west part of the south quarter of section 28, township 5, range 15, conveyed to The Sandusky & Columbus Short Line Railway Company, by Frederick J. Picard, April 8th, 1893.

(9) A tract of land in the county of Delaware, city of Delaware, being in-lot 1512 of D. H. Potter's second addition to the city of Delaware, conveyed to the Sandusky & Columbus Short Line Railway Company, by Richard W. Reynolds, April 8, 1893.

(10) A tract of land in the county of Delaware, city
171 of Delaware, being in-lot 1746, conveyed to The Sandusky & Columbus Short Line Railway Company by Richard W. Reynolds, November 24, 1893.

(11) A tract of land in the county of Delaware, city of Delaware, being in-lot 1747, conveyed to the Sandusky & Columbus Short Line Railway Company by Richard W. Reynolds, November 24, 1893.

(12) A tract of land containing about 25 acres, in the county of Delaware, city of Delaware, adjoining to the west line of the C., C., C. & St. L. R. R. Co., conveyed to the Sandusky & Columbus Short Line Railway Company by Richard W. Reynolds, November 24, 1893.

(13) A tract of land in the county of Delaware, city of Delaware, being in-lots 1456, 1457, 1458, 1459, 1468, 1469 and 1470 of Reid and Hillyer's addition to the city of Delaware, conveyed to the Sandusky & Columbus Short Line Railway Company by Richard W. Reynolds, November 24, 1893.

(14) Two tracts of land containing 85-100 and 1 74-100 acres of land, respectively, in the county of Franklin, Sharon township, being the several parts of section 2, range 18- U. S. M. Lands, conveyed to the Sandusky & Columbus Short Line Railway Company by Solomon Wilcox, June 11, 1892, and by Frederick J. Picard April 8, 1903.

(15) A tract of land containing about 3 55-100 acres in the county of Franklin, Clinton township, adjoining the C., C., C. & St. L. R. R. Co., conveyed to the Sandusky & Columbus Short Line Railway Company by W. E. Guerin, April 8, 1893.

(16) A tract of land containing about 2 82-100 acres in the county of Franklin, Clinton township, being that part of lot 8 of Stephenson's survey, in section 4, township 1, range 18, U. S. M. Lands, conveyed to the Sandusky & Columbus Short Line Railway Company by William E. Guerin, October 5, 1893.

(17) A tract of land in the county of Franklin, city of Columbus, being that part of lots 737 and 738 of Samuel Doyle's Lockwin addition to the city of Columbus, conveyed to The Columbus & Eastern Railroad Company by Theodore Aust, September 16, 1886.

(18) A tract of land containing about 29 66-100 acres of land in Muskingum county, Newton township, being that part of the southeast quarter of section 19 of the southeast quarter of section 20, township 15, range 14, conveyed to The Columbus & Eastern Railroad Company by the Muskingum Stone Company, June 25, 1887.

(19) A tract of land containing about 7 63-100 acres
172 in Muskingum county, Brush Creek township, conveyed

to The Columbus & Eastern Railroad Company by Solomon Goodlive, October 26, 1886.

(20) A tract of land containing about 16 acres in Perry county, Clinton township, being that part of sections 13 and 14, township 16, range 15, conveyed to The Columbus, Shawnee & Hocking Railway Company by L. C. Guy, April 16, 1890, and by R. L. Henderson, April 21, 1890.

(21) A tract of land in Ferrarra, Perry county, Monroe township, composed of lots 405, 407 and 408, in Venning and Robya addition to Ferrarra, conveyed to The Shawnee & Muskingum River Railroad Company July 20, 1888, by William A. Studer.

XII. That on or about the 21st day of August, 1895, in an action then pending in the Common Pleas Court for the County of Crawford, in the State of Ohio, and brought by the Metropolitan Trust Company of the city of New York *against* The Columbus, Sandusky and Hocking Railway Company, the then owner of the railroad and other property now owned by the defendant herein, for the foreclosure of certain mortgages, there were duly issued, pursuant to the order of the court, the said court having possession of said railroad and other property by its receiver, two hundred and fifty thousand dollars ($250,000) of receiver's certificates, being 25 in number, in and by each of which certificates N. Monsarrat, as receiver of the Columbus, Sandusky & Hocking Railway Company, certified that he, as receiver, was justly indebted to the Metropolitan Trust Company of the city of New York in the sum of ten thousand dollars ($10,000), which, with interest thereon at the rate of six per cent. per annum, payable semi-annually, should be due on or before the 1st day of July, 1896.

That on or about the 1st day of November, 1895, the said court being still in the possession of such railroad and property, there was a further and similar issue of two hundred and fifty thousand dollars ($250,000) of receiver's certificates, pursuant to a further order of said Common Pleas Court in the aforesaid action.

XIII. That the aforesaid certificates (hereinafter called the "Monsarrat certificates") consist of fifty certificates of the principal sum of ten thousand dollars ($10,000) each, numbered from one to fifty, both inclusive, and that the same were shortly after their issue and while said court was in the possession of said railroad and other property, negotiated, sold and delivered by the said receiver for the full par value
173 thereof to the Metropolitan Trust Co. of the city of New York, individually, and to the defendant, F. G. Hallet, and that the said Metropolitan Trust Co., of the city of New

York owns two hundred and fifty thousand dollars ($250,000) thereof, and that the said defendant, F. G. Hallett, holds and owns the other two hundred and fifty thousand dollars ($250,000) thereof.

XIV. That the orders and decrees of said Common Pleas Court, pursuant to which the said certificates were issued, decreed and adjudged, and the certificates themselves recited that the said cerificates should be the first and best lien upon all the property of the aforesaid The Columbus, Sandusky & Hocking Railway Company, and should be first paid out of the earnings of said Company after the payment of its operating expenses, and if not so paid, then should be paid out of the proceeds arising from the sale of the property of said company first after the payment of the costs in said action.

XV. That thereafter in the aforesaid foreclosure action in the Court of Common Pleas for Crawford County, a sale was had under its decree of the railroad and property covered by the mortgages foreclosed therein for one million five hundred thousand five hundred dollars ($1,500,500) cash, and that after the said property had been sold the defendant, The Columbus, Sandusky & Hocking Railroad Company acquired the same from the bidders at such judicial sale, and agreed to discharge the obligations of such bidders to said court, and that said defendant Railroad Company also agreed to pay the principal and interest due on the said Monsarrat certificates.

XVI. That the time of the filing of the dependent and ancillary bill herein on the 24th day of October, 1898, the aforesaid five hundred thousand dollars ($500,000) of Monsarrat receiver's certificates, together with interest thereon since the first day of January, 1897, had never been paid and that the whole thereof still remains due and unpaid and in default.

That the following sums are now due and payable on the date of this decree for principal and interest on the said certificates:

| | |
|---|---|
| Interest from January 1st, 1897, to date of this decree at 6 per centum per annum | $ 95,833 33 |
| Principal of certificates | 500,000 00 |
| Total | $595,833 33 |

174 XVII. That the aforesaid five hundred thousand ($500,000) dollars of Monsarrat certificates, with the interest due thereon, are not a lien upon the property of said defendant railroad company covered by the said prior lien and general mortgages, but are to be paid out of the proceeds of the sale of said property applicable to the payment of said eight hundred thousand ($800,000) dollars of prior lien bonds,

and the interest warrants or coupons attached thereto, with interest thereon, referred to in Paragraph III hereof, and to be distributed as hereinafter directed.

XVIII. That in this action there have been issued, pursuant to the orders of this court, receiver's certificates (hereinafter called Felton and Robinson certificates), amounting to the sum of one million and thirty-five thousand dollars ($1,035,000), and that the same are a valid and subsisting lien upon all the property of the defendant Railroad Company; that on account of the said certificates there are due for principal and interest the following amounts:

| | |
|---|---|
| Principal | $1,035,000 00 |
| Interest on $200,000 from Jany. 1, 1900, to date of decree | 1,939 39 |
| Interest of $64,425.95 from Oct. 1, 1899, to date of decree | 1,431 60 |
| Interest on $317,000 from Jany. 1, 1900, to date of decree | 3,054 17 |
| Interest on $15,000 from Jany. 1, 1900, to date of decree | 145 83 |
| Interest on $121,000 from Dec. 1, 1899, to date of decree | 1,680 55 |
| Total | $1,043,251 54 |

That in addition to the aforesaid receiver's certificates a large amount of indebtedness has been incurred by the receivers appointed in this cause.

That in addition to the sums hereinbefore found to be due upon said prior lien and general mortgage bonds, and the Felton and Robinson certificates, and the indebtedness of the receivers in this cause, the said defendant Railroad Company is indebted in large sums, of which the payment is over due, and it has made default in the payment thereof, and is unable to pay the same, and is wholly insolvent. That neither said defendant R. R. Co. nor said receivers have means to pay the aforesaid indebtedness, and it is necessary for the protection of the crditors of said receivers and holders of the Felton and Robinson
175 certificates as well as the holders of said prior lien and general mortgage bonds and coupons, and of the other creditors of the Railroad Company and for the best interests of all concerned, that all the railroads, properties and franchises of said defendant Railroad Company shall be sold free from the respective liens, claims and equities of the certificate and bondholders as aforesaid, and of all other claimants or lien-holders in this consolidated cause, save as herein provided, said liens,

claims and equities, including said Felton and Robinson certificates, to be paid out of the proceeds of sale according to their priorities as hereinafter decreed. That the railroads and appurtenances, rolling stock, equipment and other property and franchises of said defendant Railroad Company are so situated that the same can not be sold in parcels without great injury to the parties in interest, and that it is expedient that the same shall be sold as an entirety, except as hereinafter provided.

XIX. It is further ordered, adjudged and decreed that the defendant, The Columbus, Sandusky & Hocking Railroad Company, within sixty days after the entry of this decree, pay or cause to be paid into the registry of this court, for the use and benefit of the creditors of said defendant Railroad Company and its receivers, the following sums, viz.:

(1) Two million one hundred and fifty-three thousand four hundred and fifty-four dollars and eighty-six cents ($2,153,454.86).

(2) An additional sum sufficient to pay the costs and expenses of this cause, including proper compensation and allowances to the trustees and their counsel, as the same may be taxed and allowed by this court.

In case the amount hereinabove in subdivision (1) found to be due and payable shall be paid as hereinbefore decreed, then any of the parties hereto may apply to this court for such further relief and for such further directions as may be just and equitable.

XX. It is further ordered, adjudged and decreed that, in default of payment of all of said sums by said defendant Railroad Company, or by any one claiming under it, or by any one for its account, the said prior lien and general mortgages shall be foreclosed and the said mortgaged premises, properties and franchises described in Paragraphs V, X and XI, of this decree shall be sold as hereinafter directed, without valuation, appraisement or redemption, and that all rights, title, estate, interest and equity of redemption of the defendant Railroad
176 Company, and of each and of all the parties to this consolidated cause, and of all intervenors therein, and of all persons, claiming or to claim under them, or any of them, of, in or to the said mortgaged premises, property and franchises, and every part and parcel thereof, shall be forever barred and foreclosed without right of redemption.

XXI. It is further ordered, adjudged and decreed that the said mortgaged premises and property, real, personal or mixed, rights, privileges, immunities and franchises, shall be sold upon the terms and in the manner following:

(1) Such sale shall be made by Joseph Robinson, the said person being appointed for the special reason of his familiarity

with these proceedings and with the subject matter of this decree and his accessibility to the parties to the cause and others interested, who is hereby appointed special master at a compensation not exceeding fifteen hundred dollars ($1,500) to make, direct and conduct the said sale, and to execute and deliver deeds of conveyance of the railroad, properties and franchises to be sold to the purchaser thereof (the word purchaser, as used in this decree, being intended to include the plural as well as the singular number in case there shall be more than one purchaser), upon the order confirming such sale, and upon payment or settlement of the purchase price bid as hereinafter provided; and the court reserves the right, in term time, or in chambers, to appoint any other person such special master, with like powers, in case of the death, inability to act or removal of the special master herein designated.

(2) Said mortgaged premises, railroad, properties and franchises shall be offered for sale as an entirety.

(3) The sale of said mortgaged premises, railroad properties and franchises shall be had at public auction to the highest bidder or bidders at the County Court House in the city of Columbus, Franklin County, Ohio, the same being the county in which the greater part of the property is located, on the day or days to be fixed by said special master, and notice of the time and place of sale, describing briefly the property to be sold, and referring to this decree, shall be published at least once in each week for six successive weeks preceding the day of sale, in at least one newspaper printed, regularly issued and having a general circulation in each of the following places, respectively: Columbus, Ohio; Cincinnati, Ohio, and New York, N. Y.

(4) The special master shall receive no bid from any
177 one offering to bid for said railroad, properties and franchises, who shall not first deposit with him as a pledge that he will make good his bid, in case of its acceptance, the sum of fifty thousand dollars, by certified check upon any national bank or trust company in the city of New York or the city of Columbus, Ohio, payable to the registry of this court, or fifty thousand dollars par value of the Felton and Robinson certificates, or one hundred thousand dollars par value of the prior lien bonds.

Upon the acceptance of any bid, the purchaser shall forthwith deposit with said special master the sum of two hundred thousand dollars by certified check upon any national bank or trust company of approved credit in the city of New York or the city of Columbus, Ohio, payable to the registry of this court, or two hundred and fifty thousand dollars par value of the aforesaid Felton or Robinson certificates, or five hundred thousand dollars par value of prior lien bonds. Any cash, certificates or

bonds which may have been previously deposited by the successful bidder as a pledge that he would make good his bid shall be received on account of the amount so required on the acceptance of his bid. The deposit of certificates or bonds above required may be made, either in certificate or bonds, or by the transfer to and deposit with the master of certificate of deposit for such certificates or bonds signed by an incorporated Trust Company of New York stating that such certificates or bonds are held subject to the order of the party named in such certificate. Any holders of Monsarrat certificates may hereafter apply to this court for leave to use such certificates for the purposes mentioned in sub-division 4 of paragraph XXI, in such amounts and upon such terms as may be by this court approved.

In case any bidder shall fail to make such deposit upon acceptance of his bid, the special master shall forthwith again offer the said property for sale without further notice or advertisement. The deposit received from any unsuccessful bidder shall be returned to him when the property shall be struck off. The deposit received from the successful bidder shall be deposited by the special master in the registry of the court, to be held and applied on account of the purchase price of the property for which said bid was made.

(5) The special master shall accept no bid unless same shall at least equal the sum of two million seven hundred and fifty thousand ($2,750,000) dollars. In case that amount shall not be bid the special master shall adjourn the sale, and shall
178 apply to the court for further instructions.

(6) Any party to this suit, or any holder or holders of any of said certificates or bonds, may bid and purchase at such sale.

XXII. In case any bidder or purchaser shall fail to make good his bid upon its acceptance by the special master or shall fail to comply with any order of the court relating to the payment thereof or the consummation of the purchase, then the sums in cash or certificates or bonds deposited by such purchaser as hereinbefore provided shall be forfeited as a penalty for such failure and shall be applied towards the expenses of a resale and towards making good any deficiency or loss, in case the property shall be thereafter sold at a price less than that bid at the prior sale. If the court shall not confirm the sale, the deposit shall be returned to the bidder.

In lieu of paying in cash the amount required to be paid, the purchaser may turn in Felton and Robinson certificates and such uncontested liens as are herein adjudged to be prior in lien mortgage, at their face value, with accrued interest thereon. Prior lien and general mortgage bonds and Monsarrat certificates, so far as said certificates may hereafter be adjudged to be entiitled to receive distribution out of the proceeds of sale,

may each be used in payment as cash to the amount of their respective distributive shares of the proceeds of sale. Prior lien bonds when used in bidding or in payment as in this paragraph XXI provided, shall not be received by the master unless accompanied by all coupons appertaining thereto as shown by the interest calculations in paragraph IV, or cash for missing coupons. General mortgage bonds, when used in payment, should be accompanied by all coupons appertaining thereto as shown by the interest calculation in paragraph IX, or cash for missing coupons.

The court reserves the right to resell said railroad, property and franchises upon such notice as the court shall direct in case the purchaser thereof shall fail or omit to make any payment on account of any unpaid balance or purchase price within thirty days after the entry of an order requiring such payment. All sums of money and all certificates or bonds received by the special master shall forthwith be deposited with the Mercantile Trust Company of New York, subject to the order of this court, and a certificate of said Trust Company that it holds such aforesaid certificates or bonds to an amount therein specified subject to the order of the party therein named and
179 transferred by such party to the order of such special master, shall be received and accepted by him as a deposit at the time of sale or on account of the purchase price as herein provided, in lieu of such certificates or bonds, with like force and effect, as though the certificates or bonds therein named had been delivered to such special master.

The purchaser of said railroad, properties and franchises shall have ninety days after being put in possession of said property to elect whether he or they shall not assume or adopt any of the leases or contracts sold with the property hereinbefore described or heretofore or hereafter entered into by the receiver of this court. Notice of rejection of any such leases or contracts shall be given at any time within said period by written notice filed by the purchaser or his successor with the clerk of this court and with the other party or parties to the said lease or contract.

The purchaser shall, as part of the consideration for the railroad property and franchises purchased, and in addition to the sum bid therefor, take the same and receive the deed therefor upon the express condition that to the extent that the assets or the proceeds of assets in the hands of the receiver not subject to any other lien or charge shall be insufficient for that purpose, such purchaser, his successors or assigns, shall pay, satisfy and discharge:

(*a*) Any unpaid compensation which shall be allowed by the court to the receiver.

(*b*) Any indebtedness and obligations or liabilities other than receiver's certificates which shall have been contracted or incurred by either of the receivers in this cause before delivery of the possession of the property sold, in the management, operation, use, or preservation thereof.

In the event that the purchaser of said railroad, properties and franchises, his successors or assigns, after demand made shall refuse to pay any of the indebtedness or liabilities hereinbefore in subdivision (*a*) and (*b*) of this paragraph referred to, the person holding the claim therefor upon fifteen days' notice, to such puchaser and his successors or assigns, may file his petition in this court to have such claim enforced against the properties sold, in accordance with the rules and practice of this court in relation to claims of similar character, and such purchaser and his successors or assigns shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, and any party shall have the right to appeal from any judgment, decree or order made thereon.

180 For the purpose of enforcing the foregoing provisions of this decree, jurisdiction of these causes is retained by this court, and the court retains the right to retake and resell said property in case such purchaser or his successors or assigns shall fail to comply with any order of the court in respect of the payment of such prior indebtedness or liabilities within thirty days after the service of a copy of such order.

Any such purchaser, and his successors and assigns, shall have the right to enter his or their appearance in this court, and he or they, or any of the parties to this suit, shall have the right to contest any claim, demand or allowance existing at the time of the sale and then undetermined, and any claim or demand which thereafter may arise or be presented which would be payable by such purchaser or his successors or assigns, or which would be chargeable against the property purchased, in addition to the amount bid at the sale; and he or they may appeal from any decision relating to any such claim, demand or allowance.

XXIII. It is further ordered, adjudged and decreed that the funds arising from such sale shall be applied as follows:

(1) Such proceeds shall first be applied to the payment of the costs of these actions, including therein all proper expenses attendant upon such sale, and the compensation of the special master appointed to make such sale; and all the charges, compensations, allowances and disbursements of the complainant The Mercantile Trust Company, Trustee, under said prior lien mortgage, and of its solicitors and counsel; and of the complainant, the Metropolitan Trust Company of the City of New York, trustee, under said general mortgage and of its solicitors and

counsel; and of all proper allowances, compensations and disbursements to any other parties or their counsel, as the court shall order. All payments to be made under this sub-division shall be hereafter fixed and allowed by this court.

(2) Such proceeds shall then be applied to the payment in full of the entire amounts due for principal and interest upon the Felton and Robinson certificates and any further certificates hereafter issued by the receiver under order of the court; and it is hereby provided that, all of the directions of this decree heretofore made in respect to the Felton and Robinson certificates now outstanding shall apply in favor of the persons holding certificates hereafter to be issued, whether under authority
181 or authority hereafter to be given; the said certificates shall be presented and shall upon payment be by the said special master canceled.

(3) Such proceeds shall next be applied to the payment of the liens of Jonas M. McCune, Jacob Klee, The Second National Bank of Sandusky, The Railroad Equipment Company, and Horatio Atchison, Guardian, as hereafter set out in paragraphs XXVII, XXVIII, XXIX, XL and XLVI.

(4) Such proceeds shall next be applicable to the payment in full of the entire amounts due for principal and interest, with interest on unpaid interest, on the outstanding bonds secured by the prior lien mortgage as follows:

(*a*) That portion of such proceeds as shall be applicable to the payment of the twelve hundred thousand ($1,200,000.00) dollars of such bonds referred to in Paragraph III hereof, and the interest thereon, with interest on unpaid interest, according to the interest calculations in Paragraph IV hereof, shall be distributed upon presentation of said bonds and the interest warrants or coupons respectively which shall upon payment be by said special master canceled.

(*b*) That portion of such proceeds as shall be applicable to the payment of the eight hundred thousand ($800,000.00) dollars of said bonds referred to in Paragraph III hereof, and the interest thereon, with interest on unpaid interest according to the interest calculations in Paragraph IV hereof, shall be applicable to the payment of said Monsarrat certificates and the interest thereon and such other claims as may be ordered to be paid out of the proceeds of said bonds pursuant to the provisions of paragraph XXXII.

Should said Monsarrat certificates be paid in full hereunder, they shall be canceled by the master.

(5) Such proceeds shall, except as provided in Paragraph XLVI hereof next be applied to the payment in full of the entire amounts due for principal and interest on the bonds secured by the general mortgage upon presentation of said

bonds and the interest warrants or coupons respectively which shall upon payment be by said special master canceled.

(6) If in any application of the proceeds in subdivisions 4 and 5 above directed the same shall not be sufficient to discharge in full the indebtedness therein directed to be paid the same shall be applied to the payment in full or ratably,

first, of interest on interest, if any; secondly, of interest
182 and accrued interest upon the principal at the date of sale, and, thirdly, of the principal. Such bonds, certificates, interest warrants or coupons as shall be partly paid, shall be stamped as partly paid and returned to the holders thereof.

(7) If, after making all the payments, herein directed to be made, there shall be a surplus, then the same shall be applied as the court may order and direct.

Whenever the special master shall be prepared out of the proceeds of sale to pay any of the bonds or coupons to be paid, as above specified, he shall, upon the request of the solicitors of the trustee under the mortgage securing the bonds so to be paid, give notice of the time when and the place where, he shall be prepared to make such payment, by publication at least once a week for two successive weeks in at least one newspaper in each of the following cities, viz.: New York, N. Y., and Columbus, Ohio.

XXIV. It is further ordered, adjudged and decreed that upon payment of the purchase price bid by the purchaser in accordance with the provisions of this decree, the said special master shall execute proper deed or deeds, conveying and assigning the railroad, properties and franchises to such purchaser, or his successors or assigns, and upon the execution and delivery of such deed or deeds the grantee therein shall be let into possession of the premises conveyed and the receiver shall deliver any of the premises sold which may be in their possession over to the purchaser, his successors or assigns, together with any moneys, property and net income, if any, acquired or received by the receivers since the commencement of this suit up to the date of such delivery of possession, in the management or operation of such delivery of possessions, in the management or operation of the mortgaged premises embraced in such conveyance, without, however, prejudice to such rights as may exist in favor of holders of preferential claims to have any net earnings of the receivership applied to the payment of their claims.

Until the conveyance to the purchaser, his successors or assigns, of the mortgaged premises, sold under this decree, the receiver shall continue in possession thereof, and discharge the duties imposed upon him by the order of his appointment,

with the rights and powers thereby conferred, including the right to issue receiver's certificates in accordance with any orders of this court; he shall keep a correct account of the earnings and income of the premises accruing after the
183 date of sale, and, if the sale shall be confirmed, the purchaser on delivery of possession by the receiver shall, as hereinbefore provided, be entitled to receive the net income and earnings accruing subsequent to the date of sale, and the proceeds of such income and earnings, without prejudice as aforesaid.

The purchaser of the railroad property and franchises and his successors and assigns, respectively, after such delivery of the premises shall hold, possess and enjoy the same and all the rights, privileges, immunities and franchises appertaining thereto, as fully and completely as said defendant, The Columbus, Sandusky and Hocking Railroad Company or its receivers now holds or enjoys the same, or held or enjoyed, or was entitled to hold and enjoy the same at the time of the acquisition of the title to the said premises and of the execution of the said prior lien and general mortgages, or at any time since, and the purchaser and his successors and assigns, respectively, shall be entitled to have and hold the premises so conveyed free and discharged from the claims, liens and encumbrances of all parties and claimants, and those claiming under them, in this consolidated cause save the floating indebtedness of Felton and Robinson, receivers, which shall be assumed by the purchaser.

XXV. It is further ordered, adjudged and decreed, that at the time of the delivery of any such deed by the special master, the receiver shall make, execute and deliver to the purchaser of said railroad, properties and franchises, his successors and assigns, a good and sufficient deed or deeds of conveyance of any and all property of the defendant railroad company, including any and all property appurtenant to said premises, or acquired for use in connection with or for the purposes of said railroad and properties, including all rolling stock and engines, floating and other equipment, acquired by said receiver.

The said special master is hereby required promptly to make a full report of his proceedings under the order of sale herein and from time to time such supplementary reports as may be necessary or desirable to show fully his action in the premises.

XXVI. It is further ordered, adjudged and decreed that in case the proceeds of such sale applicable to the payment of said bonds, interest and coupons shall not be sufficient to pay in full the amounts hereinbefore found to be due thereon
184 for principal and interest, then the said special master shall report to the court the amount of the deficiency

or deficiencies and shall specify the parties to whom such deficiency or deficiencies are payable, and on the confirmation of said report the respective parties who may be entitled thereto shall have judgment against the defendant, The Columbus, Sandusky and Hocking Railroad Company for the amount of the deficiency or deficiencies due them respectively, and shall have execution therefor, pursuant to the rules and practice of this court.

XXVII. And it is further ordered, adjudged and decreed that the claim of the defendant, Jonas M. McCune, as set forth in his answer and cross-petition, filed herein on the 28th day of December, 1898, is a good and valid claim and a first lien upon that part of the property of the defendant railroad company situated in the city of Bucyrus, in the county of Crawford, in the state of Ohio, and bounded and described as follows:

The east part of the northwest part of the northeast quarter of section twelve (12), township three (3), south of range sixteen (16) east, commencing at a stone on the north line of said quarter section 5.28 100 chains east of the northwest corner thereof and running thence north 85 degrees 30 minutes east 5.28 100 chains to a stone; thence south 2.45 minutes east 11.37 100 chains to a stone; thence south 85.30 minutes west 5.28 100 chains to a stone; thence north 2.45 minutes west 11.37 100 chains to the place of beginning, containing six (6) acres more or less, being subject to all legal highways; the same being outlot No. 217 revised numbers in said city of Bucyrus.

That the amount of the said lien is the sum of two thousand seven hundred and eleven and 85-100 dollars ($2,711.85) with interest thereon from January 30th, 1898, at the rate of six per centum per annum; that any purchaser of the property of the defendant railroad company shall take this part thereof subject to the aforesaid lien and subject to the right of the said Jonas M. McCune, at any time to have this part of the said defendant railroad company's property sold, free and clear of all encumbrances, for the payment of the said debt.

XXVIII. And it is further ordered, adjudged and decreed, that the claim of the defendant, Jacob Klee, as set forth in his answer filed herein on the 20th day of January, 1899, is a good and valid lien upon the following lands and tenements situated in the city of Delaware in the county of Delaware in
185 the state of Ohio, and known by the following description:

Being part of subdivision "E" of original outlot No. 1, bounded as follows: Beginning at the southeast corner of subdivision "D" in the north line of William street, being at the southwest corner of said lot "E"; thence east on the north line

of William street fifty (50) feet; thence north to the middle line of said outlot, the same being the north line of said lot "E"; thence west fifty (50) feet; thence south to the place of beginning, being fifty feet wide off the west side of the premises conveyed to A. Blymyer by I. J. Richardson and wife July 24, 1867, excepting therefrom a strip two (2) feet wide from off the west side of said lot and running back within twenty (20) feet of the back or north end of said lot, which is reserved from the condition of this deed, be the same more or less, but subject to all legal highways.

That the amount of the said lien is seven hundred and eighty-three and 50-100 ($783.50) dollars, with interest thereon from the 8th day of February, 1898, at the rate of six per centum per annum; that any purchaser of the property, of the defendant railroad company, shall take this part thereof subject to the aforesaid lien and subject to the right of the said Jacob Klee at any time to have this part of said defendant railroad company's property sold, free and clear of all encumbrances, for the payment of the said debt.

XXIX. It is further ordered, adjudged and decreed that the exceptions of Joseph Robinson, receiver, and of the Metropolitan and Mercantile Trust Companies herein to the finding of the master that the Second National Bank of Sandusky, is entitled to a lien upon the following described property; situate in the city of Sandusky, Erie County, Ohio, known as parts of outlots numbered 24, 32 and 33, and bounded and described as follows: Beginning at the N. E. Corner of outlots number 24 of Darling's survey, of a 364 acre tract of the Isaac Mills estate west of the city of Sandusky, Portland Township, Erie County, State of Ohio; thence S. 2 deg. 30 minutes east 515.5 feet to a point on the N. right of way line of the Lake Shore & Michigan Southern Railway Company right of way; thence N. 83 deg. 08 minutes W. 802.4 feet along said right of way line to a street; thence N. 2 deg. 30 minutes W. 413.2 ft. to S. right of way line of the Cleveland, Cincinnati, Chicago & St. Louis Railway right of way; thence N. 52 deg. 58 minutes S. 485 feet to a point on
dividing line between outlots numbers 32 and 25 of said
186 tract; thence S. 2 deg. 30 minutes E. 294 feet along said
dividing line to the common corner of outlots 32, 25, 24 and 33 of said tract; thence S. 89 deg. 13 minutes E. 395.2 feet to point of beginning and containing (9.96) nine and ninety-six one hundredths acres more or less. Being the same real estate conveyed to the defendant, Ed. H. Zurhorst, by the deed of George Marshal and Elizabeth, his wife, filed for record on Nov. 7, 1892, with the recorder of Erie County, Ohio.

Also the following real estate in the city of Sandusky, Erie County, Ohio, situate in the city of Sandusky, county of Erie

and state of Ohio, and known as parts of outlots Nos. 25 and 9, beginning at the common corner of outlots Nos. 24, 25, 32 and 33 of Darling's survey of a 364 acre tract of Isaac Mills' estate west of the city of Sandusky in Portland Township, Erie County, state of Ohio, and extending thence south 89 deg. 13 minutes E. 395.2 feet to a street; thence N. 2 deg. 30 W. 251.8 feet along west side of said street; thence S. 57 deg. 20 minutes W. 485.2 feet to a point of beginning and containing (1.14) one and fourteen hundreths acres; also, beginning at a point S. 89 deg. 31 minutes E. 345 feet from S. W. corner of outlot number 9; thence N. 52 deg. 04 minutes 364.9 feet to middle of Mills Creek; thence at right angles S. 37 deg. 56 minutes E. 68 feet; thence at right angles S. 52 deg. 04 minutes W. 262.6 feet; thence N. 89 deg. 31 minutes W. to point of beginning and containing (63) sixty-three hundredths acres be the same more or less, but subject to all legal highways.

Are overruled; and it is adjudged that the said Second National Bank has a lien upon the said property prior to that of any party or claimant in this suit, to secure the payment of $5,379.90 with interest at 7 per cent. per annum from October 24, 1892, to December 13, 1898, less the sum of $744.85 heretofore paid to said Zurhorst by way of interest. It is further adjudged that the said Zurhorst holds the said property as trustee for the defendant railroad company subject to the aforesaid lien of the Second National Bank, and of the prior lien and general mortgage hereinbefore described in the order named, and it is further adjudged that the said property be sold with and as a part and parcel of the railroad property hereinbefore described, in satisfaction of the aforesaid liens and that said Zurhorst on the confirmation of the said sale execute a conveyance to the purchaser thereof, or in default of so doing, that
187 the deed of the special master hereinbefore appointed to make the sale and execute to said purchaser a deed, shall operate as such conveyance and pass to the purchaser all the said right, title and interest of said Zurhorst.

And it is further adjudged that Hewson L. Peeke, John H. Waginet, D. L. C. Ransom, guardian of Webster H. Ransom and Ross D. Ransom, minors; Frank Stang, A. D. Prout and James Flynn, have no lien upon any part of the property of the defendant railroad company.

And it is further adjudged that the report of the said master with reference to the said property and the respective claimants thereto, except as in this paragraph modified, is in all respects confirmed, and all exceptions not in conformity with the provisions of this paragraph are overruled and dismissed.

XXX. And it is further ordered, adjudged and decreed, that the intervening petitions of John P. McCune, Edward K. Stew-

art and George T. Jarvis, receiver of the Louisville, Evansville and St. Louis Consolidated Railroad Company, The Charles Scott Spring Company, and the Cleveland Terminal & Valley Railway Company are dismissed for want of equity at their costs, and that the exceptions of the said parties to the master's report filed herein Sept. 25, 1899, are overruled except as herein otherwise ordered; and it is adjudged that none of said parties has any lien upon any of the property described.

XXXI. It is further adjudged that the demurrers to the intervening petitions of John G. Carlisle, Charles S. Hinchman and Joseph F. Randolph are sustained and the said petition is dismissed for want of equity and that the exceptions of the said parties to the master's report save as herein otherwise provided are overruled; and it is adjudged that none of said parties has any lien upon any of the property herein described except as general mortgage bondholders.

XXXII. And it is further ordered, adjudged and decreed that the exceptions of the Metropolitan Trust Company in its own right and of the defendant, F. G. Hallett, as holders of Monsarrat certificates, to the report of the master filed herein Sept. 25, 1899, are overruled. That the intervening petition of the Metropolitan Trust Company, in its own right filed here-
188 in on the 9th day of March, 1900, as by leave of this court amended by amendment filed on the same day, is dismissed in so far as it prays that its Monsarrat certificates shall be fully paid and satisfied out of the proceeds of sale herein before any portion of said proceeds shall be devoted to the payment of any interest or principal of the prior lien bonds. That the relief prayed for by the defendant F. G. Hallett in his answer herein as originally filed in so far as said answer prayed that by virtue of his Monsarrat certificates he be decreed a lien upon the property herein foreclosed prior to any lien or claim upon the said property is denied.

And it is further ordered, adjudged and decreed that it is referred to H. M. Butler, who is hereby appointed Special Master to inquire into and preport upon the issues raised by any pleadings made by George W. Sinks to the amended petition of the Metropolitan Trust Company and the amended answer of the defendant F. G. Hallett, both filed herein by leave of court of March 9th, 1900, and to inquire into and report upon any claims against said eight hundred (800) prior lien bonds hereinbefore in paragraph III referred to, and against the scrip therefor; that the said master give notice which shall be published once a week for two successive weeks in one newspaper of general circulation in the city of Columbus, Ohio, and one newspaper of general circulation in Bucyrus, Crawford County, Ohio, requiring all persons claiming an interest in the said eight hundred (800)

prior lien bonds of The Columbus, Sandusky & Hocking Railroad Company, numbered from 1201 to 2000, both inclusive, or claiming an interest in the scrip for said bonds deposited with the clerk of the Common Pleas Court of Crawford County, Ohio, pursuant to an order in an action in said court brought by the Metropolitan Trust Company of the City of New York, trustee, against the Columbus, Sandusky and Hocking Railroad Company, to produce and prove the same before the said Special Master on or before the 12th day of May, 1900; such notice shall not apply to the Metropolitan Trust Company and F. G. Hallett, but they shall have notice of all hearings before the said master. That the said master shall as soon as possible report to this court as to all claims against the said prior lien bonds and against the said scrip, and as to the distribution which should be made of the proceeds of sale applicable to the payment of the said eight hundred (800) prior lien bonds.

189 And it is further ordered, adjudged and decreed that distribution shall be made in accordance with the provisions of the clause of the decree of the Crawford County Common Pleas Court relating to said eight hundred bonds as constructed by the decree herein and as equity may require except as the application of the decree of said Crawford County Common Pleas Court to said 800 bonds now in the possession of said George W. Sinks, trustee, may be hereafter successfully contested by said Sinks, trustee, and other claimants not parties hereto before the master and this court.

It is further ordered, adjudged and decreed that the provisions of this decree as to the right of the holders of said Monsarrat Certificates to be paid out of the proceeds of sale applicable to the payment of the said eight hundred (800) bonds as in paragraph XVII, adjudged, shall be binding and controlling upon said master as to all claims presented to him by any party to this cause or exceptors to the report of H. M. Butler, master, but none of its provisions shall be binding upon George W. Sinks, nor any other persons not parties to this cause who may become claimants upon said bonds under this paragraph.

XXXIII. It is further ordered, adjudged and decreed that the exceptions of Adams & Westlake; William Harland & Sons; Hann & Adair; The National Tube Works; Pittsburg Forge & Iron Company; Arnold & Morton; Harmon and Robinson, receivers of the Baltimore & Ohio Southwestern Railway Co.; Louisville & Nashville R. R. Co.; New York, Chicago & St. Louis Railroad Company; Indiana, Decatur & Western Railway Company; U. S. Bronze Company; Clinton National Bank; Grand Trunk Railway Company; Wabash Railroad Company; Park Brothers & Company (Limited); N. & G. Taylor Company; Cincinnati, Hamilton & Dayton Railway Company; Merchant

& Company; E. E. Shedd & Company; Standard Scale & Supply Company; John P. McCune, trustee, Charles Parrott, *et al.*; W. P. Little, *et al.*; George W. Sinks, and of all other persons who filed exceptions to the master's report filed herein on Sept. 25, 1899, save as herein otherwise ordered are overruled, and that the said report as to the said claims is in all respects confirmed. That none of said claimants has any lien upon any of the property herein described.

But the exceptions of Wm. P. Little, *et al.*, and of Geo. W. Sinks, to so much of the Master's findings in his report of September 25, 1899, as holds that The Columbus, Sandusky & Hocking Railroad Company is a corporation organized under
190 Sections 3393 and 3398, inclusive, Revised Statutes of Ohio, are sustained.

It is further ordered that the demurrers of the Mercantile and Metropolitan Trust Companies to the intervening petition of Chase Andrews as receiver of the Zanesville Terminal Railroad Company heretofore filed in this cause, are sustained and that the said intervening petition be dismissed.

XXXIV. It is further adjudged that the exceptions of Theodore Leonard to the Master's report in so far as the said Master finds that he has no lien upon any of the property herein described are overruled; but the case is referred back to the Master to report whether he has a lien upon the money collected by S. M. Felton, receiver, from the Hallwood Cash Register Company, and it is ordered that the cost of said reference be paid by said Leonard.

XXXV. It is further ordered, adjudged and decreed that the exceptions of E. M. Poston, D. L. Sleeper and M. H. Donohue to the said Master's report are overruled in so far as the said Master found that the claims of the said parties were not a lien upon any of the property herein described; but the said exceptions are sustained in so far as the Master found that the claim was not one against The Columbus, Sandusky & Hocking Railroad Company, but merely against the receiver thereof. And it is now adjudged that the said claimants have not a lien upon any of the property herein described, but have a general claim against the said Railroad Company for the amount found due them in said Master's report.

XXXVI. It is further ordered, adjudged and decreed that the intervening petition of W. S. Gregg except so far as it seeks to have his claim set forth therein allowed as a six months' claim, be and the same is hereby dismissed, and that so far as said intervening petition seeks to have said claim allowed as a six months' claim be and the same is hereby sustained and said claim allowed as a six months' claim accordingly; and it is further ordered that the exceptions of said W. S. Gregg to the re-

port of the Master except as to matter of interest on said claim be likewise overruled and said report as to said claim confirmed; and that as to said matter of interest said exceptions to the Master's report be and the same hereby is sustained and interest on said claim of W. S. Gregg allowed as claimed in said exceptions and his intervening petition.

XXXVII. The first exception of the Ensign Manufacturing Company to the report of the Master is sustained, it appearing from the further evidence submitted by said company, by leave of court, that its said claim for $1,072.98 occurred within six months prior to the appointment of S. M. Felton as receiver. The other exceptions of said Ensign Manufacturing Company to the report are overruled.

191

XXXVIII. It is further ordered that the claim of W. E. Guerin filed in this cause on the — day of ——, be stricken from the files, and it is adjudged that the said Guerin has no lien whatsoever upon any of the property herein described.

XXXIX. It is further ordered, adjudged and decreed that the intervening petition of Nicholas Monsarrat, receiver of the Columbus, Hocking Valley & Toledo Railway Company, is dismissed and his exceptions to the finding of the Master in his report filed herein September 25, 1899, are overruled, and it is adjudged that the said Monsarrat, receiver, by virtue of his two judgments rendered against the defendant Railroad Company, April 12, 1897, for $1,046.36 and September 29, 1897, for $1,820.34, both in the County of Franklin, State of Ohio, as a lien upon the real property then in the possession of the said Felton, receiver, situated in the said county, upon the dates of the said judgments; but that said lien is junior and inferior to the liens of the prior lien and general mortgages and the liens adjudged prior thereto.

XL. It is further adjudged that the defendant the Railroad Equipment Company has the legal title to the following described rolling stock; Two (2) mogul locomotives, cylinders 19x24 inches, built by the Pittsburg Locomotive Works, railroad numbers 29 and 30, owner-s plate numbers 1 and 2; six (6) passenger cars, railroad numbers 20 to 25 inclusive, owner's plate numbers 1 to 6 inclusive; two (2) baggage and mail cars, railroad numbers 14 and 15, owenr's plate numbers 7 and 8; two (2) consolidated locomotives, cylinders 20x24, owner's plate numbers 1 and 2; two (2) mogul locomotives, cylinders 19x24, built by the Pittsburg Locomtive Works, owner's plate numbers 3 and 4; one hundred (100) gondola coal cars, twenty (20) ton capacity; nine hundred (900) gondola coal cars twenty (20) ton capacity, owner's plate numbers 5 to 1004, built by Pennock Bros., Minerva, Ohio; and that there is now due the said Equipment Company upon its lease warrants upon said rolling stock

the sum of fifty-one thousand four hundred and 65-100 ($51,400.65) dollars, with interest, and that the same is not subject to the lien or claim of any party or claimant in this cause except the equitable lien of said Felton and Robinson cer-
192 tificates so far as the proceeds of same may have been expended in preserving or improving the said quipment; it is ordered that said property be sold, together with the other property herein described, the full amount of the claim of said Equipment Company as aforesaid to be paid out of the proceeds of the sale herein ordered. But the provisions of this paragraph are without prejudice to the rights if any of Arthur and Emile Levita, partners as Levita & Company under and by virtue of their writ of attachment and garnishment served upon the receiver in this cause, and without prejudice to the rights of any persons claiming title to this fund or any part thereof under said Equipment Company.

XLI. It is further ordered, adjudged and declared that the exceptions of the Galena Oil Company to the said Master's report are overruled in so far as the said master finds that the said claim is not entitled to any lien upon any of the property herein described; but that the said exceptions are sustained to the extent that the credit of $247 was applied by the master in reduction of the amount due the said company for oil furnished to the railroad company within six months prior to the appointment of a receiver in this cause; and it is adjudged that the said Oil Company is entitled to apply the said credit upon the indebtedness due the said Oil Company accruing prior to said six months' period, and that the amount due the said Oil Company from the said Railroad Company for supplies furnished within the said six months' period is $1,883.72.

XLII. It is further ordered, adjudged and decreed that the exceptions of S. M. Kinsey and the E. A. Kinsey Company to the Master's report filed herein September 25, 1899, are overruled and dismissed, and it is adjudged that the said claimants have not any lien upon any of the property herein described; but it is further ordered that the said Master's supplemental report filed herein upon October , 1899, wherein he finds that the amount of the claim due S. H. Kinsey, executrix, from the Railroad Company, shall be reduced by $4,096.71, which said amount should be added to the amount found to be due to E. A. Kinsey Company, is confirmed, making the totals now found due to the said S. M. Kinsey, executrix, and E. A. Kinsey Company respectively, $982.17 and $12,860.53.

XLIII. It is further ordered, adjudged and decreed that the exceptions of Joseph Robinson, receiver, herein, of the Metropolitan and Mercantile Trust Companies, and F. G. Hal-

193 let and Joseph F. Randolph, *et al.*, to the finding of the master allowing a lien in favor of Gertrude Hesse, administratrix of Neil Hesse, upon all of the property in possession of S. M. Felton, as receiver, as of March 20, 1899, are sustained; and it is adjudged that the said Gertrude Hesse has not any lien upon any of the property herein described prior to or superior to the lien of the prior lien and general mortgages and the liens herein adjudged prior thereto. But that said Gertrude Hesse, administratrix, has a subordinate lien upon the property in the hands of the receiver of the said Railroad Company upon March 20, 1899, situated in the County of Perry, Ohio.

XLIV. It is further ordered, adjudged and decreed that except as herein modified the amounts set out in column 6 of the Master's report of September 25, 1899, Schedule Exhibit A1, pages 27 to 36 of his printed report, inclusive, are the true and correct amounts accruing to the claimants as set out in the said Schedule Exhibit A1, within six months prior to the appointment of S. M. Felton, as receiver in this cause, and that interest upon the said claims runs from the dates found by the said master in Schedule Exhibit A2 of said report.

XLV. It is further ordered, adjudged and decreed that all persons who have failed to present their claims before the master as provided by the order of February 20, 1899, are forever barred from asserting any lien upon any of the property herein described; and that all persons who appeared or presented claims before the said master under the order of July 8, 1899, and the amendments thereto, except as herein otherwise ordered, are declared to have no lien upon any of the property hereinbefore described, and forever barred from asserting any lien upon the said property at any time hereafter.

XLVI. And it is further ordered, adjudged and decreed on the pleadings and stipulations hereinafter in this paragraph referred to that the mortgage made by David S. Gray and Virginia D. Gray, his wife, to the defendant George W. Sinks, as trustee, to secure the payment of two hundred thousand dollars ($200,000) represented by two hundred (200) notes of the Columbus, Shawnee & Hocking Railway Company for one thousand dollars ($1,000) each, which mortgage was made under date of June 1st, 1892, is a valid lien prior in right to the general mortgage, but inferior in lien to the prior lien mortgage hereinbefore described upon the following property:

Beginning at an iron pin in the center of St. Clair
194 avenue, 307 feet north of the center of Leonard avenue; thence north 86 degrees 36' west 1312 & 89-100 feet to an iron bolt in the center of a 20 foot alley parallel to the Harbor road; thence north 37 degrees 44' east 597 & 66-100 feet along said alley to an iron bolt; thence south 86 degrees 56' east 973

& 45-100 feet to an iron pin in the center of St. Clair avenue; thence along the center of St. Clair avenue 491 & 22-100 feet to the place of beginning, being an original tract of land of 12 89-100 acres in the name of Sarah Shoemaker. Also lots Nos. eight (8), nine (9), ten (10), thirteen (13), and fourteen (14) of Sarah Shoemaker's addition to Clinton township, Franklin County, Ohio. All fronting on Harbor road, in said township, and containing 1 37-100 acres. Said 12 89-100 tract and said lots containing 1 37-100 acres, aggregating 14 26-100 acres. Excepting from said lands and lots the 1 80-100 acres, which has been dedicated for street purposes on the south side of said lands, amounting in the aggregate to 1 43-100 acres, leaving 11 03-100 acres absolutely; and also conveying all the interest in Clinton avenue and a 20 foot alley, subject only to any interest the public may have by reason of the dedication heretofore by Sarah Shoemaker, having been made. All of said premises hereinbefore described being in Clinton township, Franklin County, Ohio.

Also a strip of land, being in the fourth quarter of the first township and eighteen (18) range of the U. S. Military lands, beginning on the east boundary line of the lands conveyed by Theodore Leonard, assignee to Sarah Shoemaker, by deed recorded in the record of deeds of Franklin County, aforesaid in Volume 137 at page- 409 and 410, at an iron bolt at the southeast corner of a parcel of land conveyed by Christopher and Sarah A. Shoemaker to Franklin P. Shoemaker, on or about the 15th day of March, 1890; thence with the southern line of said last named tract of land north 87 degrees 29' west 1442.37 feet to an iron bolt planted in the center of St. Clair avenue south 2 degrees 56' west 301 80-100 feet to an iron bolt; thence south 87 degrees 29' east 1444.25 feet to the eastern boundary of said Sarah A. Shoemaker's land. Thence north 2 degrees 44' east with said eastern boundary line 301 80-100 feet to the place of beginning, containing ten (10) acres of land, it being the same premises heretofore conveyed by Christopher Shoemaker and wife to William H. Shoemaker by deed dated 11th day of April, 1885, and recorded in deed book No. 179, pages 95 and 96 of the record of deeds in recorder's office, Franklin County, Ohio.

195 Also a strip of land, situated in Clinton township, Franklin County, Ohio, described as follows, to-wit:

Beginning at an iron pin in the center of a 20 foot alley east and paralled to the Harbor road and being at the northwest corner of a 12 89-100 acre tract of land owned by Sarah Shoemaker; thence along the north line of said 12 89-100 acre tract, south 80 degrees 56' east 973 45-100 feet to an iron pin in the center of St. Clair avenue north 3 degrees 03' east 252 40-100 feet to an

iron pin; thence south 86 degrees west 750 9-100 feet to an iron pin in said 20 foot alley; thence south 38 degrees 33' west 337 04-100 feet to the place of beginning, containing five acres of land and being the south half of a ten acre tract of land owned by Devoice Shoemaker.

And it is further ordered that said property be sold together with the railroad property herein described as a part and parcel thereof. If the proceeds of the sale of the entire property be more than sufficient to pay the prior lien mortgage herein described together with all claims and liens herein adjudicated prior thereto, including the Felton and Robinson certificates, the costs of this action and the claim of Horatio Atchison, guardian hereinafter referred to, then out of that portion of said surplus proceeds which corresponds to the proportionate value of the property in this paragraph described, to the value of the entire property herein ordered to be sold, hereafter to be determined, it is ordered that the interest and principal of the mortgage of D. S. Gray to George W. Sinks, as above defined be first paid; any surplus after such payment to be paid as the court may hereinafter order.

And it is further adjudged that the demurrer of said Geo. W. Sinks, trustee, to the ancillary and dependent bill of the Metropolitan Trust Company as amended and to the cross bill of the Mercantile Trust Company filed against said Sinks, trustee, be and hereby are overruled, and leave is given the said Sinks to file answers to said amended bill and cross bill within two weeks from the date hereof, which said answers are to conform to the agreed stipulation of facts heretofore entered into by and between the said Sinks, trustee, and the Metropolitan and Mercantile Trust Companies.

And it is further adjudged that Horatio S. Atcheson, as guardian of the personal property of Alfred K. Atcheson, is entitled to a first and prior lien upon that portion of the property in this paragraph described as follows:

Being in the fourth quarter of first township and
196 eighteenth range of U. S. M. Lands, beginning at an iron bolt at the southeast corner of a parcel of land conveyed to Christopher P. Shoemaker; thence with the southern line of said last-named tract of land N. 87 29' W. 1442.37 feet to an iron bolt planted in the center of St. Clair avenue, S. 2 56' W. 301.80 feet to an iron bolt; thence S. 87 29' E. 1444.25 feet to the eastern boundary of said Sarah A. Shoemaker's land; thence north 2 44' E. with said eastern boundary line 301.80 feet to the place of beginning, containing ten acres of land.

And it is ordered, that out of the cash payment made by the purchaser of the entire property said claim amounting to $1,500, together with interest thereon from the 18th day of

June, 1899, at the rate of six per cent. per annum, be paid in full.

XLVII. The exception of Joseph Robinson, Receiver, to the Master's Supplemental Report No. 2 is sustained.

XLVIII. It is further adjudged that the exception of Harrison, Olds & Henderson, and of Gilbert H. Stewart, in so far as the master in his report filed September 25, 1899, found that the said claimants were not entitled to a lien on any of the property herein described, are overruled; but the exceptions, so far as the master found that the said claims being for legal services were not claims for services rendered the company within six months prior to the appointment of the receiver thereof of equal dignity with supply claims accruing within the same period, are sustained, the court here expressly finding that said claims originated within said six months' period; and that said master's report is hereby modified accordingly.

XLIX. And it is further ordered, adjudged and decreed that the exceptions of George W. Sinks, Trustee, to the report of the master filed herein September 25th, 1899, ar overruled in so far as they except to the master's findings that they are not a lien upon any of the property herein described.

L. And it is further ordered, adjudged and decreed, that all questions not hereby disposed of, including the discharge of the receiver and the settlemnt of his accounts, are hereby reserved for future adjudication. That any party who has heretofore duly filed his bill, claim, cross bill, answer or petition herein, and any holder of any indebtedness contracted by the receiver, or by the defendant Railroad Company, may at any time apply to the court at the foot of this decree for further relief, as well as for such modifications thereof in respect to terms or conditions of the said sale, or to the distribution of the pro-
197 ceeds thereof, or in respect to any other matter, as may be just and proper; and jurisdiction in these causes is retained by the court for that purpose, and for the purpose of enforcing all the provisions of this decree.

And afterwards, to wit, on the 19th day of April, A. D. 1900, the following petition for appeal was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Petition for Appeal.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, Defendant. } No. 816.

Consolidated causes.

METROPOLITAN TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, Defendant. } No. 887.

Petition for appeal.

Winfield S. Gregg, intervening petitioner in the above entitled causes as consolidaed conceiving himself aggrieved by the orders heretofore made in the above entitled proceeding, doth hereby appeal from said orders to the United States Circuit Court of Appeals from the Sixth Circuit, and he prays that this his appeal may be allowed; that a bond may be fixed, and that a transcript of the record and proceedings and papers upon which said orders were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

C. T. MARSHALL,
CLEVELAND & BOWLER,
*Solicitors for Winfield S. Gregg.*

198 And afterwards, to wit, on the 19th day of April, A. D. 1900, the following assigment of errors was filed in clerk's office of said court, clothed in the words and figures following, to wit:

*Assignment of Errors.*

United States Circuit Court, Southern District of Ohio, Eastern Division.

MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, Defendant. } No. 816.

Consolidated cases.

METROPOLITAN TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, Defendant. } No. 887.

Assignment of errors.

Now comes the said Winfield S. Gregg, and makes the following assignment of errors and says that in the record and proceedings in the above entitled matter there is manifest error in this, to wit:

1st. Said Circuit Court erred in its order made herein on the 26th day of November, A. D. 1898, in refusing to issue receivers' certificates as prayed for by the said intervening petitioner, and in denying the relief therein prayed.

2d. Said Circuit Court erred in its decree entered herein March 10th, 1900, in ordering, adjudging and decreeing that the funds arising from the sale of the property therein described should be—after payment of the costs of said action and the Felton and Robinson certificates and certain liens therein mentioned—applied to the payment of the entire amount due for principal and interest on the outstanding bonds secured by the prior lien mortgage, and thereafter to the amounts due for principal and interest on the bonds secured by the general mortgage, and in not holding and
199 decreeing that the proceeds of said sale, after the payment of the costs, should be applied to the payment of the claim of Winfield S. Gregg, intervening petitioner herein, equally with the Felton and Robinson certificates, and in not holding and decreeing that said claim of Winfield S. Gregg, intervening petitioner herein, was entitled to payment out of the proceeds of the sale of said property prior to the amounts due on bonds secured by the prior lien mortgage and bonds

secured by the general mortgage, and certain so-called real estate notes of Jonas M. McCune and others.

3d. Said Circuit Court erred in ordering, adjudging and decreeing that the intervening petition of Winfield S. Gregg, except so far as is sought to have said claim set forth therein allowed as a six months' claim, should be dismissed, and in not ordering, adjudging and decreeing that said Winfield S. Gregg was entitled as a six months' claimant for supplies and labor to a lien and preferential claim upon the *corpus* of the property prior to the lien of the prior lien mortgage and the general mortgage.

4th. Said Circuit Court erred in overruling the exceptions of said Winfield S. Gregg, to the report of the special master, except as to the matter of interest and in confirming said report of said special master as to the claim of said Winfield S. Gregg.

5th. Said Circuit Court erred in confirming the report of the special master that, to entitle the claim of said Winfield S. Gregg, to a lien or preferential claim upon the *corpus* of the railroad property prior to the lien of the mortgages securing the bonds of said company, a diversion of earnings must be proved during the six months prior to the appointment of the receiver, and that such claim could only be charged upon the *corpus* of that property if the income before or after the receivership had been applied directly to the beneficial purposes of the mortgage debt displaced.

6th. Said Circuit Court erred in confirming the report of the special master that, the claim of said Winfield S. Gregg was not a lien or preferential claim upon the *corpus* of the property in possession of the receiver of the court, and that said Winfield S. Gregg had no such lien or preferential claim upon the *corpus* of said property, but must look for payment thereof to the earnings of said railroad only.

7th. Said Circuit Court erred in confirming the report of said special master that, there had been within six
200 months prior to the appointment of the receiver in said causes no diversion of earnings by the defendant company, and also in holding that during said receivership there had likewise been no diversion of earnings of said company.

8th. Said Circuit Court erred in dismissing said intervening petition so far as it sought to have the claim of said Winfield S. Gregg for ties supplied during the month of May, which were in the possession of said railroad at the time of the appointment of the receiver, which came into the possession of, and were used by the receiver of said court to the amount and value of $3,200.00, allowed as a claim prior to the prior lien mortgage and general mortgage, and paid by the receiver or

out of the proceeds of the sale of the property prior to such mortgages.

9th. Said Circuit Court erred in holding and decreeing that, in order to entitle the claim of Winfield S. Gregg for supplies and labor to a lien or preferential claim upon the *corpus* of the railroad property, a diversion of earnings must be proved during a fixed period prior to the taking of the railroad property by the court, and that such debt could only be charged upon the *corpus* of the property if the income before or after the receivership had been applied directly to the beneficial purposes of the mortgage debt displaced.

10th. Said Circuit Court erred in holding and decreeing that, the claim of said Winfield S. Gregg was not a lien or preferential claim upon the *corpus* of the property in possession of the receiver of the court, and that said claimant had no lien or preferential claim upon the *corpus* of said property, but must look for payment to the earnings of said railroad only.

11th. Said Circuit Court erred in holding and decreeing that, there had been no diversion of earnings by said Railroad Company within six months prior to the appointment of the receiver or during the receivership and prior to said decree for the benefit of the bondholders.

12th. Said Circuit Court erred in holding and decreeing that, said Winfield S. Gregg, as a six months' claimant, was not entitled to be paid by the receiver, out of the proceeds of the sale of the property of said Railroad Company ordered to be sold prior to the bonds secured by mortgages after having appointed a receiver at the request of the trustees of the prior lien mortgage and general mortgage, and of the defendant Railroad Company under an order which expressly provided that such claims should be paid.

201 13th. Said Circuit Court erred in refusing to pay said claim of Winfield S. Gregg as a six months' claim, or to order its receiver so to do, or to order the same to be paid prior to the amounts found due on bonds secured by the prior lien mortgage when it had paid and ordered its receiver to pay, certain of said six months' claims which were of no higher rank than said claim of Winfield S. Gregg.

14th. Said Circuit Court erred in other matters apparent upon the face of the record.

C. T. MARSHALL,
CLEVELAND & BOWLER,
*Solicitors for Winfield S. Gregg.*

And afterwards, to wit, on the 21st day of May, A. D. 1900, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

## Entry—Journal D, Page 493.

*Appeal Allowed.*

This day came Winfield S. Gregg, intervening petitioner herein, in open court, and at the same term at which the decree appealed from was entered, and presented his petition for an appeal and assignment of error and, the court having examined the same and finding them to be in all respects regular and in accordance with law, it is ordered that the prayer of said petitioner be granted and the appeal of Winfield S. Gregg from this court to the Circuit Court of Appeals for the Sixth Circuit be, and the same is hereby, allowed as prayed for, and bond is fixed in the sum of $500.00.

And it appearing to the court that the appeal has been prayed for and allowed in open court, and at the same term at which the decree and orders of the court complained of were entered, it is further ordered that a citation to the parties hereto be dispensed with on the perfecting of said appeal within the present term of this court.

And thereupon came said Winfield S. Gregg, and presented his bond and sureties, and the court having examined the same and found said bond to be in all respects regular and in accordance with law, it is ordered that the same be, and it is hereby, approved as the bond in said appeal of Winfield S. Gregg.

202 And afterwards, to wit, on the 21st day of May A. D. 1900, the following appeal bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Appeal Bond.*

Know all men by these presents, that we, Winfield S. Gregg, as principal, and Wesley Dutro and Amos C. Helmick, as sureties, are held and firmly bound unto The Metropolitan Trust Co. of the city of New York; The Mercantile Trust Co. of New York; Joseph Robinson, receiver of the Columbus, Sandusky & Hocking Railroad Co., and other parties of the Consolidated Cause No. 887, United States Circuit Court, Southern District of Ohio, Eastern Division, "Metropolitan Trust Co., &c., vs. The Columbus, Sandusky & Hocking R. R. Co.," in the full and just sum of five hundred dollars ($500.00), to be paid to the said Metropolitan Trust Co., of the city of New York; The Mercantile Trust Co. of New York; Joseph Robinson, receiver, as aforesaid and others, their cer-

tain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by those present.

Sealed with our seal and dated this 12th day of May, in the year of our Lord, on thousand nine hundred.

Whereas, lately at a session of the United States Circuit Court for the Southern District of Ohio, Eastern Division, in a suit depending in said court between The Metropolitan Trust Co. of the city of New York, complainant, and the Columbus, Sandusky & Hocking Railroad Co., *et al.*, defendants, No. 887, Consolidated Cause, wherein said Winfield S. Gregg was an intervening petitioner, a decree was rendered against the said Winfield S. Gregg, and the said Winfield S. Gregg, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit and a citation directed to the said Metropolitan Trust Co., of the city of New York; The Mercantile Trust Co. of New York; Joseph Robinson, receiver, and others, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the twentieth day of June next.

Now, the condition of the above obligation is such that if the said Winfield S. Gregg shall prosecute his appeal to effect, and answer all damages and costs if he may fail to
203 make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WINFIELD S. GREGG, [SEAL.]
WESLEY DUTRO, [SEAL.]
AMOS C. HELMICK. [SEAL.]

Sealed and delivered in presence of
N. S. CHANDLER,
C. T. MARSHALL.

Approved by
A. C. THOMPSON,
*District Judge, Sitting as Circuit Judge.*

UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division, Muskingum Co.*

Before me, N. S. Chandler, a United States Commissioner in and for the district and county aforesaid, personally came Wesley Dutro, one of the sureties within named, who, being by me first duly sworn, deposes and says that he is worth the sum of

$1,000.00 in real estate over and above all his debts and liabilities in addition to all exemptions and subject to execution and situate in the Southern Distrct of Ohio and Eastern Division.

WESLEY DUTRO.

Sworn to before me and subscribed in my presence, this 12th day of May, A. D. 1900.

N. S. CHANDLER,
*U. S. Com-r, S. D. O.*

UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division, Muskingum Co.* }

Before me, N. S. Chandler, a United States Commissioner in and for the district and county aforesaid, personally came Amos C. Helmick, one of the sureties within named, who, being by me first duly sworn, deposes and says that he is worth the sum of $1,000.00 in real estate over and above all his debts and liabilities in addition to all exemptions and subject to execution and situate in the Southern District of Ohio, and Eastern Division.

AMOS C. HELMICK.

204 Sworn to before me and subscribed in my presence, this 14th day of May, A. D. 1900.

N. S. CHANDLER,
*U. S. Com-r, S. D. O.*

THE UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division,* } *ss*:

I, Benjamin R. Cowen, clerk of the Circuit Court of the United States of America, within and for the Division and District aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause, as the same appears of record and on file in the clerk's office of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, Ohio, this 24th day of May, A. D. 1900.

[SEAL.] B. R. COWEN, *Clerk,*
By ROBT. C. GEORGI, *Deputy Clark.*

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

| | |
|---|---|
| THE METROPOLITAN TRUST CO. OF THE CITY OF New York, Trustee, and in its Individual right, Complainant, *vs.* THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants. | No. 887. Consolidated Cause. |

We, the undersigned, respectively waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit, and waive further notice of said appeal and respectively enter our appearances thereto.

JOHN P. McCUNE,
EDWARD K. STEWART,
JOHN P. McCUNE, *Trustee*,
GEORGE W. SINKS, *Trustee*,
CHARLES PARROTT AND OTHERS,
205 WILLIAM P. LITTLE AND OTHERS,
By WATSON, BURR & LIVESAY, and
HARRISON, OLDS & HENDERSON,
*Their Attorneys.*

THE COLUMBUS, TERMINAL & TRANSFER R. R. CO.,
By FRANK C. HUBBARD and
HARRISON, OLDS & HENDERSON,
*Their Attorneys.*

HARRISON, OLDS & HENDERSON,
*In Pro Persona.*

No. 887. Consolidated cause. Cir. ct. of the U. S. S. D. O., E. D. The Metropolitan Trust Co., &c., *vs.* The C., S. & H. R. R. Co., *et al.* Appeal of Winfield S. Gregg.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST CO. OF THE CITY OF New York, Trustee, and in its Individual right, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants.
} No. 887 Consolidated Cause.

We, the undersigned, respectively waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit, and waive further notice of said appeal and respectively enter our appearances thereto.

LAWRENCE W. MAXWELL, JR.,
*Counsel for Joseph Robinson, Receiver.*

No. 887. Consolidated cause. Cir. ct. of the U. S. S. D. O., E. D. The Metropolitan Trust Co., &c., *vs.* The C., S. & H. R. R. Co., *et al.* Appeal of Winfield S. Gregg.

206 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST CO. OF THE CITY OF New York, Trustee, and in its individual right, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants.
} No. 887. Consolidated Cause.

We, the undersigned, respectively waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit, and waive further notice of said appeal and respectively enter our appearances thereto.

KLEIN, CARR, TOLLES & GOFF.

No. 887. Consolidated cause. Cir. ct. of the U. S. S. D. O., E. D. The Metropolitan Trust Co., &c., *vs.* The C., S. & H. R. R. Co., *et al.* Appeal of Winfield S. Gregg.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST CO. OF THE CITY OF New York, Trustee, and in its individual right, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants.

No. 887. Consolidated Cause.

We, the undersigned, respectively waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit, and waive further notice of said appeal and respectively enter our appearances thereto.

PARSONS, SHEPARD & OGDEN,
*Solicitors for Metropolitan Trust Co., Trustee.*

207 No. 887. Consolidated cause. Cir. ct. of the U. S. S. D. O., E. D. The Metropolitan Trust Co., &c., *vs.* The C., S. & H. R. R. Co., *et al.* Appeal of Winfield S. Gregg.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST CO. OF THE CITY OF New York, Trustee, and in its individual right, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants.

No. 887. Consolidated Cause.

We, the undersigned, respectively waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit, and waive further notice of said appeal and respectively enter our appearances thereto.

N. MONSARRAT,
*Receiver C., H. V. & T. Ry. Co.,*
*An Intervenor Defendant.*
By C. O. HUNTER, *Of Counsel.*

May 21, 1900.

No. 887. Consolidated cause. Cir. ct. of the U. S. S. D. O., E. D. The Metropolitan Trust Co., &c., *vs.* The C., S. & H. R. Co., *et al.* Appeal of Winfield S. Gregg.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST CO. OF THE CITY OF New York, Trustee, and in its individual right, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants.
} No. 887. Consolidated Cause.

208 We, the undersigned, respectively waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit, and waive further notice of said appeal and respectively enter our appearance thereto.

HENRY CRAWFORD,
*Solicitor for Met. Trust Co., and Hallett.*

No. 887. Consolidated cause. Cir. ct. of the U. S. S. D. O., E. D. The Metropolitan Trust Co., &c., *vs.* The C., S. & H. R. R. Co., *et al.* Appeal of Winfield S. Gregg.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST CO. OF THE CITY OF New York, Trustee, and in its individual right, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants.
} No. 887. Consolidated Cause.

We, the undersigned, respectively waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit, and waive further notice of said appeal and respectively enter our appearances thereto.

THE RAILROAD EQUIPMENT CO.,
By F. F. DUEBERRY, *Its Solicitor.*

No. 887. Consolidated cause. Cir. ct. of the U. S. S. D. O., E. D. The Metropolitan Trust Co., &c., *vs.* The C., S. & H. R. R. Co., *et al.* Appeal of Winfield S. Gregg.

209 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST CO. OF THE CITY OF New York, Trustee, and in its individual right, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants.
} No. 887. Consolidated Cause.

We, the undersigned, respectively waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit, and waive further notice of said appeal and respectively enter our appearances thereto.

HERRON, GATCH & HERRON,
*Solicitors for Chas. Scott Spring Co.*

No. 887. Consolidated cause. Cir. ct. of the U. S. S. D. O., E. D. The Metropolitan Trust Co., &c., *vs.* The C., S. & H. R. R. Co., *et al.* Appeal of Winfield S. Gregg.

Circuit Court of the United Sates, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST CO. OF THE CITY OF New York, Trustee, and in its individual right, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants.
} No. 887. Consolidated Cause.

We, the undersigned, respectively waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit, and waive further notice of said appeal and respectively enter our appearances thereto.

ALEXANDER & GREEN,
*Solicitors for Mercantile Trust Co., Trustee.*

210 No. 887. Consolidated cause. Cir. ct. of the U. S. S. D. O., E. D. The Metropolitan Trust Co., &c., *vs.* The C., S. & H. R. R. Co., *et al.* Appeal of Winfield S. Gregg.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE METROPOLITAN TRUST CO. OF THE CITY OF New York, Trustee, and in its individual right, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING Railroad Company, *et al.*, Defendants.
} No. 887. Consolidated Cause.

We, the undersigned, respectively waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit, and waive further notice of said appeal and respectively enter our appearances thereto.

J. G. CARLISLE, *et al.*,
By WAGER SWAYNE, *Atty.*

No. 887. Consolidated cause. Cir. ct. of the U. S. S. D. O., E. D. The Metropolitan Trust Co., &c., *vs.* The C., S. & H. R. R. Co., *et al.* Appeal of Winfield S. Gregg.

And afterwards, to wit, on the 19th of January, A. D. 1901, the following mandate was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Mandate.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit*, } *ss*:

The President of the United States: To the honorable, the judges of the circuit court of the United States for the southern district of Ohio.

Greeting:

Whereas, lately in the circuit court of the United
211 States for the Southern District of Ohio, before you or some of you, in a cause between Metropolitan Trust Co., and the Columbus, Sandusky & Hocking Railroad Co., wherein a decree was rendered on the claims of Winfield S. Gregg, upon his intervening petition, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the act of Congress in

such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause be and the same is hereby reversed with costs with leave to re-open the report of the Master upon the subject of diversion in accordance with the opinion of this court.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable W. Melville W. Fuller, Chief Justice of the United States, the 18th day of June, in the year of our Lord one thousand nine hundred and one.

*Court of Appellants.*

| | |
|---|---|
| Clerk | $31.75 |
| Printing record | 181.10 |
| Attorney | 20.00 |
| | $232.85 |

[SEAL.] FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

212 United States Circuit Court of Appeals, for the Sixth Circuit.

WINFIELD S. GREGG, *vs.* MERCANTILE TRUST CO. } No. 858.

*Statement of Costs.*

| | | |
|---|---|---|
| Docketing cause and filing record | $5.00 | $5.00 |
| 1 appearance | .25 | .25 |
| Filing 13 papers | .25 | 3.25 |
| Filing briefs | 5.00 | 10.00 |
| Arguments | | .20 |
| Transfer of Docket | 1.00 | 1.00 |

| | | |
|---|---|---|
| Submission | .20 | .20 |
| Judgment of decree | 1.00 | 1.00 |
| Filing same | .25 | .25 |
| Recording same, 1 folio, etc. | .20 | .40 |
| Mandate | 5.00 | 5.00 |
| Opinion | $1.00 to 5.00 | 5.00 |
| Costs and copy | .40 | .40 |
| Clerk's costs | | $31.75 |
| Cost of printing record | | 181.10 |
| Attorney's docket fee | | 20.00 |
| | | $232.85 |

Received payment for the costs taxed above, except the attorney's docket fee.

FRANK O. LOVELAND,
*Clerk U. S. Circuit Court of Appeals, Sixth Circuit.*

And afterwards, to wit, on the 25th day of November, A. D. 1901, the following entry was made upon the journal of said court, clothed in the words and figures following, to wit:

213 Journal E—Page 210.

EXHIBIT "A."

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY OF THE City of New York, as Trustee, Complainant,
*against*
THE COLUMBUS, SANDUSKY AND Hocking Railroad Company and others, Defendant.
} No. 887. In Equity. Consolidated Cause.

THE MERCANTILE TRUST COMPANY, OF NEW YORK, AS Trustee, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD Company, Defendant.

This consolidated cause having come on to be heard at this October Term in the year 1901, and the defendant Railroad Company having been duly served with subpoenas to answer

the original bill of The Mercantile Trust Company of New York, as Trustee, and the ancillary and dependent bill of the Metropolitan Trust Company of the City of New York, as Trustee, and having appeared by counsel and by answers admitted the allegations of said original bill, and being in default as to said ancillary and dependent bill, and having consented by counsel in open court to this decree; and various intervening petitions having come on to be heard, and issues raised thereon and upon the pleadings, and various matters having been referred to H. M. Butler, Master, for his findings of facts and conclusions of law; and the said Master having filed his report herein dated Sept. 25, 1899, and two supplemental reports and the exceptions of parties interested therein to the findings of fact and conclusions of law having been filed, and the said exceptions having come on to be heard; and thereafter upon consideration of all thereof a decree bearing date the 10th day of March, 1900, having been made and entered in regard thereto and thereafter certain appeals having been duly allowed and taken from the said decree to the United
214 States Circuit Court of Appeals for the Sixth Circuit and bonds on appeal having been given and orders entered whereby all proceedings under said decree were superseded and stayed until the determination of the said appeals, and the said appeals having come on to be heard at its October Term, 1900, by the said United States Circuit Court of Appeals for the Sixth Circuit having been argued by counsel, and the said Circuit Court of Appeals having upon consideration thereof rendered certain opinions and made certain orders and by way of mandates directed that the aforesaid decree of March 10, 1900, should be in various respects modified, affirmed and reversed, which said mandates direct that proceeding be had in conformity with the opinion and decree of the said Circuit Court of Appeals, as according to right and justice and laws of the United States ought to be had; said mandate more particularly specifying as follows:

As to the matters in the appeals of Winfield S. Gregg, intervenor, claimant and exceptor to the Special Master's Report said appeal being No. 858, the mandate specifying that said decree of March 10, 1900, was reversed with costs, with leave to reopen the report of the Special Master upon the subject of diversion in accordance with the opinion of the Circuit Court of Appeals.

As to the matters in the appeals of John P. McCune, intervenor, claimant and exceptor to the report of the Special Master, said appeal being No. 859, the mandate specifying that said decree was affirmed with costs;

As to the matter in the appeal of Edward K. Stewart, in-

tervenor, claimant and exceptor to the report of the Special Master, said appeal being No. 860, the mandate specifying that said decree was affirmed with costs;

As to the matters in the appeal of George W. Sinks, Trustee, said appeal being No. 861, the mandate specifying that said decree was affirmed with costs;

As to the matters in the appeal of John P. McCune, as Trustee, for himself, Jonas M. McCune, David S. Gray, Clinton D. Firestone, William E. Guerin, Frederick J. Picard, James Watson, Henry Stearns, Theodore Leonard, George W. Sinks, Gilbert C. Hoover and Charles Parrott, claimants and exceptors to the report of the Special Master, said appeal being No. 862, the mandate specifying that the said decree was modified so far as to hold appellant McCune, Trustee, entitled to stand in shoes of various labor claims assigned to him, and that the decree otherwise was affirmed with costs;

As to the matters in the appeal of William P. Little,
215 Jonas M. McCune, James Watson, Thomas D. Huntington, Charles Parrott, David S. Gray and Edward K. Stewart, claimants and exceptors to the report of the Special Master, said appeal being No. 863, the mandate specifying that said decree was affirmed with costs;

As to the matters of the appeal of Charles Parrott, Frederick J. Picard, James M. McCune, George W. Sinks, H. R. Hislop, John R. Hughes, William P. Little, Edward K. Stewart, James Watson, David K. Watson, Charles E. Burr, Howard C. Park, Eloise F. King, David S. Gray and Herbert Brooks, claimants and exceptors to the Special Master's report, said appeal being No. 864, the mandate specifying that said decree was affirmed with costs;

As to the matters in the appeal of The Columbus Terminal and Transfer Railroad Company, claimant and exceptor to the Special Master's report, said appeal being No. 865, the mandate specifying that said decree was affirmed with costs;

As to the matters in the appeal of Harrison, Olds and Henderson, claimants and exceptors to the Special Master's report, said appeal being No. 866, the mandate specifying that said decree was affirmed with costs;

As to the matters in the appeal of John G. Carlisle, Charles H. Hinchman and Joseph F. Randolph, intervenors, claimants and exceptors to the Special Master's report, said appeal being No. 867, the mandate specifying that said decree was affirmed in all respects except that it was reversed in so far as it allowed interest upon matured coupons in the hands of the holders of the prior lien bonds, and except that it was modified so far as it provided for interest upon the bonds held by Sinks, Trustees, under agreements of January 20th, 1896,

and January 24th, 1897, and also specifying that the matter of said interest upon the Sink bonds was remitted to the Circuit Court with directions to ascertain what bonds are held by said Sinks under said agreements and to deal with the matter according to justice and right, and specifying further that the costs should be divided between the receiver and these appellants;

As to the matters in the appeal of The Adams & Westlake Company, intervenors, claimants and exceptors to said Special Master's report, said appeal being No. 868, the mandate specifying that said decree of March 10th, 1900, was reversed with costs with leave to reopen the report of the Special Master upon the subject of diversion in accordance with the opinion of the Circuit Court of Appeals.

216 As to the matters in the appeal of the Metropolitan Trust Company of the City of New York, Trustee, said appeal being No. 870 the mandate specifying that said decree was rendered as to so much thereof appealed from by the Metropolitan Trust Company, Trustee, as gave precedence to the mortgage to G. W. Sinks, Trustee, over the general mortgage to the Metropolitan Trust Company, and affirmed as to so much of the decree appealed from by the Metropolitan Trust Company, Trustee, as was in favor of the Railroad Equipment Company; and that it was also affirmed as to so much of the decree as gave the Second National Bank of Sandusky a prior lien upon the 9.96 acres of the Terminal property acquired from Marshal, and that it was modified so as not to extend the lien to that part of the Terminal property acquired from Fieck and so as to allow interest only from October, 1893, and that the Metropolitan Trust Company, Trustee, should pay three-fourths and Sinks, Trustee, one-fourth of the costs;

As to the matter in the appeal of Gilbert H. Stewart, said appeal being No. 875, the mandate specifying that said decree was affirmed with costs;

As to the matter in the appeal of the Baltimore & Ohio Southwestern Railroad Company, said appeal being No. 876, the mandate specifying that said decree was reversed with costs with leave to reopen the report of the Special Master upon the subject of the diversion in accordance with the opinion of the said Circuit Court of Appeals.

As to the appeal of the Louisville & Nashville Railroad Company, said appeal being No. 877, the mandate specifying that said decree was reversed with costs, with leave to reopen the report of the Special Master upon the subject of diversion in accordance with the opinion of said Circuit Court of Appeals;

As to the matters in the appeal of the Railroad Equipment Company, said appeal being No. 886, the mandate specifying that said decree was modified so far as preference was given to receiver's debts over the decree of the Equipment Company and directly that costs should be paid by the receiver from the funds in his hands;

As to the matters in the appeal of the Mercantile Trust Company, said appeal being No. 907, the mandate specifying that said decree was affirmed as to so much of the decree appealed from by the Mercantile Trust Company as was in favor of the Railroad Equipment Company and as to so much of the decree as gave the Second National Bank of Sandusky
217 a prior lien upon the 9.96 acres of the Terminal property at Sandusky, acquired from Marshal, and that it was modified so as not to extend the lien to that part of the terminal property acquired from Fieck and so as to allow interest only from October 1, 1893, and directing that the Mercantile Trust Company pay the costs of that appeal;

As to the matters in the appeal of the Metropolitan Trust Company of the City of New York in its individual right, said appeal being No. 908, the mandate specifying that said decree was affirmed with costs;

As to the matters in the appeal of F. G. Hallett, said appeal being No. 909, the mandate specifying that said decree was affirmed with costs.

And whereas, at the time of taking the appeals aforesaid it was stipulated that the appeal on the claim of the Adams & Westlake Company, being appeal No. 868, should be used and deemed a test claim, and that the following claimants, namely, William Harland & Sons, Hann & Adair, The National Tube Works, Pitt-burg Forge and Iron Company, Indiana, Decatur and Western Railway Company, U. S. Bronze Company, N. & C. Taylor Company, Cincinnati, Hamilton & Dayton Railway Company, Merchant & Company, E. E. Shedd & Company, Standard Scale and Supply Company, Charles Scott Spring Company, S. M. Kinsey, executrix, and E. A. Kinsey Company need not prosecute proceedings in error or an appeal to review orders of the Circuit Court in regard to them, but that the same right should accrue to them as might be adjudged to the said Adams & Westlake Company, and that the same order should be made as to them as if the proceedings to review said orders as to them had been duly prosecuted; and the appeal of the Cleveland Terminal & Valley Railroad Company, said appeal being No. 910, having been dismissed;

Thereupon upon consideration of all thereof it is now, on this twenty-fifth day of November, 1901,

Ordered, adjudged and decreed, as follows:

I. That all and singular the material allegations in the bill of complaint of the Mercantile Trust Company, trustee, filed June 2nd 1897, and in the dependent and ancillary bill of the Metropolitan Trust Company of the City of New York, as trustee, filed originally October 24th, 1898, as amended by amendments filed February 23, 1899, March 10, 1899, and June 7, 1899, August 7, 1899, and March 9, 1900, are true, except as hereinafter found.

II. That on or about the 9th day of November, 1895,
218 the defendant The Columbus, Sandusky and Hocking Railroad Company (hereinafter called the "Railroad Company") duly made and executed a certain mortgage or deed of trust (hereinafter called the Prior Lien Mortgage), bearing date on that day and therein and thereby conveyed to The Mercantile Trust Company, as trustee, all its property, both real, personal and mixed, then by it owned, or thereafter to be by it acquired, to secure certain bonds of the said defendant Railroad Company by it to be issued, as in said mortgage or deed of trust provided. Which said mortgage was duly recorded in the office of the Recorder of Deeds in each of the counties in which any of the real or personal property was and is situated or employed.

III. That said defendant Railroad Company under and in accordance with the provisions of the said Prior Lien Mortgage made, executed and delivered and said The Mercantile Trust Company in the manner therein provided certified, and said defendant Railroad Company duly issued two millions dollars par value of its bonds, as therein provided, in and by each of which said bonds said defendant Railroad Company acknowledged itself indebted to the holder thereof in the sum of one thousand dollars in gold coin of the United States of the then standard of weight and fineness, and each of which bonds said defendant Railroad Company promised to pay on the first day of October, 1900, with interest thereon in the meantime at the rate of five per centum per annum, payable semi-annually on the first days of April and October in each year.

That all of such bonds at the time of the filing of said bill of complaint had been duly certified by the Trustee and delivered to the defendant Railroad Company for negotiation and issue. That said bonds are two thousand in number, numbered from one to two thousand, both inclusive, and that one million two hundred thousand dollars ($1,200,000), par value thereof, numbered from 1 to 1,200, both inclusive, have been negotiated for value to a large number of persons who are now the lawful holders and owners thereof, and that eight hundred

thousand dollars ($800,000) par value thereof, numbered from 1,201 to 2,000, both inclusive, have never been sold absolutely, but were issued and are held in trust to satisfy certain scrip to the amount of eight hundred thousand ($800,000) dollars deposited with the clerk of the Common Pleas Court of the County of Crawford, in the State of Ohio.

IV. That at the time of filing said bill of complaint
219 on the 2nd day of June, 1897, interest evidenced by interest warrants or coupons to the amount of eighty thousand five hundred and sixty-six and 67-100 dollars ($80,566.67), which matured prior to June 2nd, 1897, on said bonds was unpaid. That after maturity of said interest, demand was made for the payment of the same; that said defendant Railroad Company made default in the payment thereof and that the whole amount thereof remains due and unpaid and in default.

That the following sums were due and payable on the first day of this term, to wit, October first, 1901, for interest on the said bonds secured by said Prior Lien Mortgage, viz.:

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| Interest evidenced by interest warrants or coupons on said eight hundred (800) bonds last mentioned due April 1st, 1896 | $15,666 67 |
| Interest evidenced by interest warrants or coupons on said eight hundred (800) bonds last mentioned, due October 1st, 1896 | $20,000 00 |
| Interest evidenced by interest warrants or coupons due April 1st, 1897, except those relating to 204 certain Prior Lien Bonds held by Sinks, trustee, under the agreements of January 20, 1896, and January 27, 1897 | $44,900 00 |
| Interest as evidenced by interest warrants or coupons due October 1, 1897, except those relating to the 204 bonds aforesaid | $44,900 00 |
| Interest as evidenced by interest warrants or coupons due April 1, 1898, except those relating to the 204 bonds aforesaid | $44,900 00 |
| Interest as evidenced by interest warrants or coupons due October 1, 1898, except those relating to the 204 bonds aforesaid | $44,900 00 |
| Interest as evidenced by interest warrants or coupons due April 1, 1899, excepting those relating to the 204 bonds aforesaid | $44,900 00 |
| Interest as evidenced by interest warrants or coupons due October 1, 1899, except those relating to the 204 bonds aforesaid | $44,900 00 |

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| Interest as evidenced by interest warrants or coupons due April 1, 1900, except those relating to the 204 bonds aforesaid | $44,900 00 |
| Interest as evidenced by interest warrants or coupons due October 1, 1900, except those relating to the 204 bonds aforesaid | $44,900 00 |
| Interest upon the principal of the said bonds except the 204 bonds aforesaid from October 1, 1900, to the first day of this term, to-wit, October, 1901, at the rate of five per centum per annum | $9,800 00 |
| Total | $484,666 67 |

The foregoing computations of interest are, however, subject to correction upon the coming in of the report of the Master, H. M. Butler, Esq., hereinafter referred to in paragraph XXXVII, and to that end it is hereby referred to the said Master, H. M. Butler, Esq., to ascertain and report what prior lien bonds are held by George W. Sinks, Trustee, under the agreements of January 20th, 1896, and January 27th, 1897, and what coupons, if any, on said bonds should be cancelled and what interest, if any, said Sinks, trustee, is entitled to on said bonds under said agreements. The foregoing reference to the said Master, H. M. Butler, Esq., shall be part of the reference hereinafter made to him in Paragraph XXXVII hereof to the provisions contained or referred to in said Paragraph XXXVII hereof.

V. That said Prior Lien Mortgage is a valid and subsisting lien to secure the payment of the principal and interest of said bonds upon all the property of the defendant Railroad Company, both real, personal and mixed, as described in said mortgage, to-wit: All and singular the railroad the said defendant Railroad Company, its lands, tenements and hereditaments, rights of way, fixtures, buildings, bridges, piers, docks, wharves, fences, structures, railways, ties, locomotives, tenders, engines, cars, carriages, equipment machinery, tools, implements, materials, chattels, franchises, privileges, rights, interest, telegraph lines, rents, tolls, incomes, revenues, resources, reservations, benefits, investments, leases, contracts, assets and estate, legal and equitable, which were by it owned on said ninth day of November, 1895, or since then have been by it acquired or which in any way belong or appertain to its said railroad.

VI. That on or about the 11th day of November, 1895, the defendant Railroad Company duly made and executed its certain mortgage or deed of trust (hereinafter called the "General

Mortgage"), bearing date on that day, and therein and thereby conveyed to the Metropolitan Trust Company of the City of New York, as trustee, all its property, both real, personal and mixed, then by it owned, or thereafter to be by it acquired to secure certain bonds of said defendant Railroad Com-
221 pany by it to be issued, as in said mortgage or deed of trust provided. Which said mortgage was duly recorded in the office of the Recorder of Deeds in each of the counties in which any of the real or personal property was and still is situated or employed.

VII. That said defendant Railroad Company under and in accordance with the provisions of said General Mortgage executed and delivered in said Metropolitan Trust Company of the City of New York, as trustee, in the manner therein provided certified, and said defendant Railroad Company duly issued seven million four hundred and fifty-six thousand dollars ($7,456,000.00) par value of its said bonds, as therein provided, in and by each of which bonds said defendant Railroad Company acknowledged itself indebted to the holder thereof in the sum of one thousand dollars ($1,000) in gold coin of the United States of the then standard weight and fineness, and each of which bonds said defendant Railroad Company promised to pay on the first day of January, 1946, with interest thereon in the meantime at the rate of 2 1-2 per centum from January 1st, 1896, to January 1st, 1898, and at the rate of 3 per centum per annum from January 1st, 1898, to January 1st, 1900, at the rate of 4 per centum per annum thereafter, payable semi-annually on the first days of July and January in each year.

VIII. That on the said seven million four hundred and fifty-six thousand dollars ($7,456,000) of such bonds were at the time of the filing of said dependent and ancillary bill on the 24th day of October, 1898, and now are outstanding and valid obligations of the said defendant Railroad Company. That said bonds consisted of the seven thousand four hundred and fifty-six (7,456) bonds numbered from two thousand five hundred and forty-four to ten thousand, both inclusive, and that the same have been negotiated, sold and delivered for value to a large number of persons, who are now the lawful owners and holders thereof.

IX. That at the time of filing of the said dependent and ancillary bill on said October 24th, 1898, interest as evidenced by interest warrants which matured prior to said October 24th, 1898, on said bonds amounting to two hundred and ninety-eight thousand two hundred and forty dollars ($298,240) was unpaid. That on the first day of July, 1897, on the first day of January, 1898, and on the first day of July, 1898,

there became due and payable upon said bonds semi-annual installments of interest, but said defendant Railroad Company made default in the payment thereof and the
222 whole amount remains due and unpaid and in default.

That the following sums were due and payable on the first day of October, 1901, for interest on the said bonds, secured by the said General Mortgage, viz.:

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| Interest as evidenced by interest warrants or coupons due July 1st, 1897 | $93,200 00 |
| Interest as evidenced by interest warrants or coupons due January 1st, 1898 | $93,200 00 |
| Interest as evidenced by interest warrants or coupons due July 1st, 1898 | 111,840 00 |
| Interest as evidenced by interest warrants or coupons due January 1st, 1899 | 111,840 00 |
| Interest as evidenced by interest warrants or coupons due July 1st, 1899 | 111,840 00 |
| Interest as evidenced by interest warrants or coupons due January 1st, 1900 | 111,840 00 |
| Interest as evidenced by interest warrants or coupons due July 1st, 1900 | 111,840 00 |
| Interest as evidenced by interest warrants or coupons due January 1st, 1901 | 111,840 00 |
| Interest as evidenced by interest warrants or coupons due July 1st, 1901 | 111,840 00 |
| Interest on said bonds from July 1st, 1901, to October 1st, 1901 | 55,920 00 |
| Total | 1,025,200 00 |

X. That said General Mortgage is a valid and subsisting lien subject to said prior lien mortgage to secure the payment of the principal and interest of said bonds upon all the property of the defendant railroad company, both real, personal and mixed, as described in said mortgage, to wit: All and singlar the railroad of said defendant Railroad Company, its lands, tenements and hereditaments, leases with other railroad companies, rights of way, fixtures, buildings, ties, bridges, piers, fences, structures, railways, railway yards, sidings, locomotives, tenders, engines, cars, carriages, equipment, machinery, tools, implements, materials, docks, wharves, chattels, franchises, privileges, rights, interest, telegraph lines, rents, tools, income, revenue, resources, benefits, investments, assets and estates, legal and equitable of every kind and character, which on the said 11th day of November, 1895, were by said defendant Railroad Company owned,

or since then have been by it acquired, or which in any way belong or appertain to its said railroad.

223 XI- That the said defendant Railroad Company owns, having acquired the same either through its own purchases or those of its receivers, and there are subject to the Felton and Robinson certificates hereinafter described and to the aforesaid prior lien and general mortgages, and are to pass by virtue of the sale in this cause, properties not immediately a part of the right of way, as follows:

(1) A tract of land lying in the county of Erie and city of Sandusky composed of water lots 81 to 85, inclusive, being the same originally conveyed to S. M. Felton, as receiver of The Columbus, Sandusky & Hocking Railroad Company, by Rollin B. Hubbard, October 7, 1897.

(2) A tract of land containing 379 000-1000 acres in the County of Sandusky, York Township, being that part of the west half of the southeast quarter of section 36, township 4, range 17, conveyed to S. M. Felton, as receiver of The Columbus, Sandusky & Hocking Railroad Company to George M. Kinney, January 19, 1897.

(3) A tract of land containing 4 acres in the county of Sandusky, York Township, adjoining the land of T. C. Wood, conveyed to S. M. Felton, receiver of The Columbus, Sandusky & Hocking Railroad Company, by Thomas C. Wood, January 19, 1897, subject to the right of way reserved to T. C. Wood, his heirs and assigns by said conveyance.

(4) A tract of land in the county of Crawford, city of Bucyrus, composed of inlot 1411 conveyed to The Sandusky & Columbus Short Line Railway Company under condemnation proceedings against T. C. Hall July 9, 1892, in the Probate Court of Crawford County, Ohio.

(5) A tract of land in the county of Crawford, city of Bucyrus, being part of subdivision B, outlot 110, conveyed to The Sandusky & Columbus Short Line Railway Company, by Frederick J. Picard, September 19th, 1893.

(6) A tract of land being inlot 184, acquired by The Sandusky & Columbus Short Line Railway Company, condemnation proceedings against P. Metzger, in Probate Court of Crawford County, Ohio, September 27th, 1892.

(7) A tract of land in the county of Crawford, City of Bucyrus, conveyed to The Sandusky & Columbus Short Line Railroad Company April 8, 1893, and The Columbus, Sandusky & Hocking Railroad Company, June 6, 1898.

224 (8) A tract of land containing 11 35-100 acres more or less, in the county of Marion and city of Marion, being that part of the west *part of the west* part of the south quarter of section 28, township 5, range 15, conveyed to The Sandusky

& Columbus Short Line Railway Company, by Frederick J. Picard, April 8, 1893.

(9) A tract of land in the county of Delaware, city of Delaware, being inlot 1512 of D. H. Potter's second addition to the city of Delaware, conveyed to the Sandusky & Columbus Short Line Railway Company, by Richard W. Reynolds, April 8, 1893.

(10) A tract of land in the county of Delaware, city of Delaware, being inlot 1746, conveyed to The Sandusky & Columbus Short Line Railway Company, by Richard W. Reynolds, November 24, 1893.

(11) A tract of land in the county of Delaware, city of Delaware, being inlot 1747, conveyed to the Sandusky & Columbus Short Line Railway Company, by Richard W. Reynolds, November 24, 1893.

(12) A tract of land containing about 25 acres, in the County of Delaware, City of Delaware adjoining to the west line of the C., C., C. & St. L. R. R. Co. conveyed to The Sandusky & Columbus Short Line Railway Company, by Richard W. Reynolds, November 24, 1893.

(13) A tract of land in the County of Delaware, City of Delaware, being in lots 1456, 1457, 1458, 1459, 1468, 1469, and 1470 of Reid and Hillyer's addition to the City of Delaware, conveyed by the Sandusky & Columbus Short Line Railroad Company, by Richard W. Reynolds, November 24, 1893.

(14) Two tracts of land containing 85-100, and 1 74-100 acres of land respectively in the County of Franklin, Sharon township, being the several parts of section 2, range 18 U. S. M. Lands, conveyed to the Sandusky & Columbus Short Line Railway Company, by Solomon Wilcox, June 11, 1892, and by Frederick J. Picard, April 8, 1893.

(15) A tract of land containing about 3 35-100 acres in the County of Franklin, Clinton township, adjoining the C., C., C. & St. L. R. R. Co., conveyed to the Sandusky & Columbus Short Line Railway Company, by William E. Guerin, April 8, 1893.

(16) A tract of land containing about 2 82-100 acres, in the County of Franklin, Clinton Township, being that part of lot 8 of Stephenson's survey, in section 4, township 1, range 18, U. S. M. Lands, conveyed to the Sandusky & Columbus Short Line Railway Company, by William E. Guerin, October 5, 1893.

225 (17) A tract of land in the County of Franklin, City of Columbus, being a part of lots 737 and 738, of Samuel Doyle's Lockwin addition to the City of Columbus & Eastern Railroad Company, by Theodore Aust, September 16, 1886.

(18) A tract of land containing about 29 66-100 acres of land in Muskingum County, Newton Township, being that part of

the South-east quarter of section 19, of the Southwest quarter of section 20, township 15, range 14, conveyed to the Columbus & Eastern Railroad Company by the Muskingum Stone Company, June 25, 1887.

(19) A tract of land containing about 7 63-100 acres in Muskingum County, Brush Creek Township, conveyed to the Columbus & Eastern Railroad Company, by Solomon Goodlive, October 26, 1886.

(20) A tract of land containing about 16 acres in Perry County, Clinton Township, being that part of sections 13 and 14, township 16, range 15, conveyed to the Columbus, Shawnee & Hocking Railway Company, by L. C. Guy, April 16, 1890, and by R. L. Henderson, April 21, 1890.

(21) A tract of land in Ferrarra, Perry County, Monroe township, composed of lots 405, 407 and 408, in Vennings and Roby's addition to Ferrarra, conveyed to the Shawnee & Muskingum River Railway Company, July 20, 1888, by William A. Stuelor.

XII. That on or about the 21st day of August, 1895, in an action then pending in the Common Pleas Court for the County of Crawford, in the State of Ohio, and brought by the Metropolitan Trust Company of the City of New York against the Columbus, Sandusky & Hocking Railway Company, the then owner of the railroad and other property now owned by the defendant herein, for the foreclosure of certain mortgages, there were duly issued, pursuant to the order of the court, the said court having possession of said railroad and other property by its receiver, two hundred and fifty thousand dollars ($250,000) of receivers' certificates, being 25 in number, in and by each of said certificates, N. Monsarrat, as receiver of the Columbus, Sandusky & Hocking Railway Company, certified that he *is* a receiver was justly indebted to the Metropolitan Trust Company of the City of New York in the sum of ten thousand dollars ($10,000), which with interest thereon at the rate of six per centum per annum, payable semi-annually, should be due on or before the 1st day of July, 1896.

That on or about the 1st day of November, 1895, the court being still in the possession of such railroad and prop-
226 erty, there was a further and similar issue of two hundred and fifty thousand dollars ($250,000) of receiver's certificates pursuant to a further order of said Common Pleas Court in the aforesaid action.

XIII. That the aforesaid certificates (hereinafter called the "Monsarrat certificates") consist of fifty certificates of the principal sum of ten thousand dollars ($10,000) each, numbered from one to fifty, both inclusive, and that the same were shortly after their issue and while said court was in the possession of said railroad and other property negotiated, sold and delivered

by the said receiver for the full par value thereof to the Metropolitan Trust Company, of the City of New York, individually, and to the defendant, F. G. Hallett, and that the said Metropolitan Trust Company of the City of New York, owns two hundred and fifty thousand dollars ($250,000) thereof and that the said defendant, F. G. Hallett, holds and owns the other two hundred and fifty thousand dollars ($250,000) thereof.

XIV. That the orders and decrees of said Common Pleas Court, pursuant to which the said certificates were issued, decreed and adjudged, and the certificates should be the first and best lien upon all the property of the aforesaid the Columbus, Sandusky & Hocking Railroad Company, and should be first paid out of the earnings of said company, after the payment of its operating expenses, and if not so paid, then should be paid out of the proceeds arising from sale of the property of said company first after the payment of the costs in said action.

XV. That thereafter in the aforesaid foreclosure action in the Court of Common Pleas for Crawford County, a sale was had under its decree of the railroad and property covered by the mortgage*d* foreclosed therein for one million, five hundred thousand, five hundred dollars ($1,500,500) cash, and that after the said property had been sold the defendant, The Columbus, Sandusky & Hocking Railroad Company acquired the same from the bidders at such judicial sale, and agreed to discharge the obligations of such bidders to said court, and that said defendant Railroad Company also agreed to pay the principal and interest due on the said Monsarrat certificates.

XVI. That at the time of the filing of the dependent and ancillary bill herein on the 24th day of October, 1898, the aforesaid five hundred thousand dollars ($500,000) of Monsarrat receiver's certificates, together with interest thereon since the first day of January, 1897, had never been paid and that
227 the whole thereof still remains due and unpaid and in default.

That the following sums were due and payable on the 1st day of October, 1901, for principal and interest on the said certificates.

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| Interest from January 1st, to October first, 1901, at six per cent. per annum | $142,500.00 |
| Principal of certificates | 500,000.00 |

XVII. That the aforesaid five hundred thousand ($500,000) dollars of Monsarrat certificates with the interest due thereon and not a lien upon the property of said defendant railroad company covered by the said Prior Lien and General Mortgages, but are one of the claims to be paid out of the proceeds of the

sale of said property applicable to the payment of said eight hundred thousand ($800,000) dollars of Prior Lien bonds, and the interest warrants or coupons attached thereto referred to in paragraph III hereof, and to be distributed as hereinafter directed.

XVIII. That in this action there have been issued pursuant to the orders of the Court, Receiver's certificates (hereinafter called Felton and Robinson certificates) amounting to the sum of one million and fifty-six thousand dollars ($1,056,000) and that the same are a valid and subsisting lien upon all of the property of the defendant Railroad Company; that on account of the said certificates there were on the first day of October, 1901, due for principal and interest the following amounts.

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|---|---|
| Principal | $1,056,000.00 |
| Interest to October 1st, 1901 | 9,959.16 |
| | $1,065,959.16 |

That in addition to the aforesaid Receiver's certificates a large amount of indebtedness has been incurred by the receivers appointed in this case.

That in addition to the sums hereinbefore found to be due upon the said Prior Lien and General Mortgage bonds, and the Felton and Robinson certificates, and the indebtedness of in this cause, the said defendant Railroad Company is indebted in large sums, of which the payment is overdue and it has made default in the payment thereof and is unable to pay the same and is wholly insolvent. That neither said defendant
228 Railroad Company nor said receivers have means to pay the aforesaid indebtedness and it is necessary for the protection of the creditors of said receivers and the holders of the Felton and Robinson certificates, as well as the holders of said Prior Lien and General Mortgage bonds and coupons and of the other creditors of the Railroad Company and for the best interests of all concerned, that all the railroads, properties and franchises of said defendant Railroad Company shall be sold free from the respective liens, claims and equities of the certificate and bond holders aforesaid, and of all other claimants or lien holders in this consolidated cause save as herein provided, said liens, claims and equities including said Felton and Robinson certificates to be paid out of the proceeds of sale according to their priorities as hereinafter decreed. That the railroads and appurtenances, rolling stock, equipment and other property and franchises of said defendant Railroad Company are so situated that the same can not be sold in parcels without great injury to the parties in interest, and that it is expedient that the same shall be sold as entirety.

XIX. It is further ordered, adjudged and decreed that the defendant, The Columbus, Sandusky & Hocking Railroad company within sixty days after the entry of this decree, pay or cause to be paid into the registry of this court, for the use and benefit of the creditors of said defendant Railroad Company and its receivers, the following sums, viz.:

Two million, five hundred and seventy-five thousand eight hundred and twenty-five dollars and eighty-three cents ($2,575,825.83) with interest from the first day of October, 1901.

(2) An additional sum sufficient to pay the costs and expenses of this cause, including proper compensation and allowance to the trustees and their counsel, as the same may be taxed and allowed by this court.

In case the amount hereinbefore in subdivision (1) found to be due and payable, shall be paid hereinbefore decreed, then any of the parties hereto may apply to this court for such further relief and for such further directions as may be just and equitable.

XX. It is further ordered, adjudged and decreed that, in default of payment of all of said sums by said defendant Railroad Company, or by any one claiming under it, or by any one for its account, the said Prior Lien and General Mortgages shall be foreclosed and the said mortgaged premises, properties and franchises described in Paragraphs V, X and XI,
229 of this decree shall be sold as hereinafter directed, without valuation appraisement or redemption and that all the right, title, estate, interest and equity of redemption of the defendant Railroad Compasy, and of each and all of the parties to this consolidated cause and of all intervenors therein and of all persons claiming or to claim under them, or any of them, of, in or to the said mortgaged premises, property and franchises, and every part and parcel thereof, shall be forever barred and foreclosed, without right of redemption.

XXI. It is further ordered, adjudged and decreed that the said mortgaged premises and property, real, personal or mixed, rights, privileges, immunities and franchises shall be sold upon the terms and in the manner following:

(1) Such sale shall be made by Joseph Robinson, the said person being appointed for the special reason of his familiarity with the proceedings and with the subject matter of this decree and his accessibility to the parties to the cause and others interested, who is hereby appointed Special Master at a compensation not exceeding fifteen hundred dollars ($1,500), to make, direct and conduct the said sale, and to execute and deliver deeds of conveyance of the railroad, properties and franchises to be sold to the purchaser thereof (the word purchaser as used in this decree being intended to include the plural as well as the

singular number in case there shall be more than one purchaser), upon the order confirming such sale, and upon payment or settlement of the purchase price bid as hereinafter provided; and the court reserves the right, in term time, or in chambers, to appoint any other person such Special Master, with like powers, in case of the death, inability to act or removal of the Special Master herein designated.

(2) Said mortgaged premises, railroads, properties and franchises shall be offered for sale as an entirety.

(3) The sale of such mortgaged premises, railroad properties and franchises shall be had at public auction to the highest bidder or bidders at the County Court House in the city of Columbus, Franklin County, Ohio, the same being the county in which the greater part of the property is located, on the day or days to be fixed by said Special Master, and notice of the time and place of sale, describing briefly the property to be sold, and referring to this decree, shall be published at least once in each week for six successive weeks preceding the day of sale,
230 in at least one newspaper printed, regularly issued and having a general circulation in each of the following places, respectively: Columbus, Ohio; Cincinnati, Ohio, and New York, N. Y.

(4) The Special Master shall receive no bid from any one offering to bid for said railroad, properties and franchises, who shall not first deposit with him as a pledge that he will make good his bid, in case of its acceptance, the sum of fifty thousand dollars by certified check upon any national bank or trust company in the city of New York or the city of Columbus, Ohio, payable to the register of this court, of fifty thousand dollars par value of the Felton or Robinson certificates, or one hundred thousand dollars par value of the Prior Lien Bonds.

Upon the acceptance of any bid, the purchaser shall forthwith deposit with said Special Master the sum of two thousand dollars by certified check upon any national bank or trust of approved credit in the city of New York or the city of Columbus, Ohio, payable to the registry of this court, or two hundred and fifty thousand dollars par value of the aforesaid Felton or Robinson certificates, or five hundred thousand dollars par value of Prior Lien Bonds.

Any cash certificates or bonds which may have been previously deposited by the successful bidders as a pledge that he would make good his bid shall be received on account of the amount so required on the acceptance of this bid. The deposit of certificates or bonds above required may be made either in certificates or bonds, or by the transfer to and deposit with the Master of a certificate of deposit for such certificates or bonds signed by an incorporated Trust Company of New York stating

that such certificates or bonds are held subject to the order of the party named in such certificates. Any holders of Monsarrat certificates may hereafter apply to this court for leave to use such certificates for the purposes mentioned in subdivision 4, of Paragraph XXI, in such amounts and upon such terms as may be by this court approved.

In case any bidder shall fail to make such deposit upon acceptance of his bid, the Special Master shall forthwith again offer the property for sale without further notice or advertisement. The deposit received from any successful bidder shall be returned to him when the property shall be struck off. The deposit received from the successful bidder shall be deposited by the Special Master in the registry of the court to be held and applied on account of the purchase price of the property for which such bid was made.

231 (5) The Special Master shall accept no bid unless the same shall at least equal the sum of two million seven hundred and fifty thousand ($2,750,000.00) dollars. In case that amount shall not be bid the Special Master shall adjourn the sale, and shall apply to the court for further instructions.

(6) Any party to this suit, or any holder or holders of any certificates or bonds, may bid and purchase at such sale.

XXII. In case any bidder or purchaser shall fail to make good his bid upon its acceptance by the Special Master, or shall fail to comply with any order of the court relating to the payment thereof or the consummation of the purchase, then the sums in cash or certificates or bonds deposited by such purchaser as hereinbefore provided shall be forfeited as a penalty for such failure, and shall be applied towards the expenses of resale and towards making good and deficiency or loss in case the property shall be thereafter sold at a price less than that bid at the prior sale. If the court shall not confirm the sale, the deposit shall be returned to the bidder.

In lieu of paying in cash the amount required to be paid, the purchaser may turn in Felton and Robinson certificates and such uncontested liens as are herein adjudged to be prior in lien to the Prior Lien Mortgage, at their face value with accrued interest thereon. Prior Lien and General Mortgage bonds and Monsarrat Certificates so far as said certificates may hereafter be adjudged to be entitled to receive distribution out of the proceeds of sale may each be used in payment as cash to the amount of their respective distributive shares of the proceeds of sale. Prior Lien Bonds when used in bidding or in payment as in this and Paragraph IX provided shall not be received by the Master unless accompanied by all coupons appertaining thereto as shown by the interest calculations in Paragraph IV or cash for missing coupons. General Mortgage bonds when

used in payment should be accompanied by all coupons appertaining thereto as shown by the interest calculation in Paragraph IX or cash for missing coupons.

The court reserves the right to resell said railroad, property and franchises upon said notice as the court shall direct in case the purchaser thereof shall fail or omit to make any payment on account of any unpaid balance or purchase price within thirty days after the entry of an order requiring such payment. All sums of money and all certificates or bonds received by the Special Master shall forthwith be deposited with the
232 Mercantile Trust Company of New York, subject to the order of this court, and a certificate of said Trust Company of New York, subject to the order of this court, and a certificate of said Trust Company that it holds such aforesaid certificates or bonds to an amount therein specified, subject to the order of the party herein named, and transferred by such party to the order of such Special Master, shall be received and accepted by him as a deposit at the time of sale or on account of the purchase price as herein provided, in lieu of such certificates or bonds, with like force and effect, as though the certificates or bonds, therein named had been delivered to such Special Master.

The purchaser of such railroad, properties and franchises, shall have ninety days after being put in possession of said property to elect whether he or they shall not assume or adopt any of the leases or contracts sold with the property hereinbefore described, or heretofore or hereafter entered into by the receiver of this court. Notice of rejection of any such leases or contracts shall be given at any time within said period by written notice filed by the purchaser as his successor with the clerk of this court, and with the other party or parties to the said lease or contract.

The purchaser shall as part of the consideration for the railroad property and franchises puchased, and in addition to the sum bid therefor, take the same and receive the deed therefor upon the express condition that to the extent that the assets or the proceeds of assets in the hands of the receiver not subject to any other lien or charge shall be insufficient for that purpose, such purchaser, his successors or assigns, shall pay, satisfy and discharge.

(*a*) Any unpaid compensation which shall be allowed by the court to the Receiver;

(*b*) Any indebtedness and obligation or liabilities other than Receiver's certificates which shall have been contracted or incurred by either of the receivers in this cause before delivery of the possession of the property sold, in the management, operation, use or preservation thereof.

In the event that the purchaser of said railroad, properties and franchises, his successors and assigns, after demand made shall refuse to pay any of the indebtedness or liabilities hereinbefore in subdivisions (*a*) and (*b*) of this paragraph referred to, the person holding claim therefor, upon fifteen days' notice to such purchaser and his successors or assigns, may file his petition in this court to have said claim enforced against
233 the properties sold, in accordance with the rules and practice of this court in relation to claims of similar character, and such purchaser and his successors or assigns shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, and any party shall have the right to appeal from any judgment, decree or order made theron. For the purpose of enforcing the foregoing provisions of this decree, jurisdiction of these causes is retained by this court, and the court retains the right to retake and resell the said property in case such purchaser or his successors or assigns shall fail to comply with any order of the court in respect to the payment of such prior indebtedness or liabilities within thirty days after the service of a copy of such order.

Any such purchaser, and his successor and assigns, shall have the right to enter his or their appearance in this court, and he or they, or any of the parties to this suit, shall have the right to contest any claim, demand allowance existing at the time of the sale and then undetermined, and any claim or demand or allowance existing at the time of the sale and then undetermined, and any claim or demand which thereafter may arise or be presented which would be payable by such purchaser or his successors or assigns, or which would be chargeable against the property purchased, in addition to the amount bid at the sale; and he or they may appeal from any decision relating to any such claim, demand or allowance.

XXIII. It is further ordered, adjudged and decreed that the funds arising from such sale shall be applied as follows:

(1) Such proceeds shall first be applied to the payment of the costs of these actions, including therein all proper expenses attendant upon such sale, and the compensation of the Special Master appointed to make such sale; and all the charges, compensation, allowances and disbursements of the complainant, The Mercantile Trust Company, Trustee, under said Prior Lien Mortgage, and of its solicitors and counsel; and of the complaints of the Metropolitan Trust Company of the City of New York, Trustee, under the said General Mortgage, and of its solicitors and counsel; and of all proper allowances, compensations and disbursements to any other parties or their counsel, as the court shall order. All payments to be made under this subdivision shall be hereinafter fixed and allowed by this court.

(2) Such proceeds shall then after first paying there-
234 from the claim of the Railroad Equipment Company, as provided in Paragraph XL hereof or retaining the amount thereof in case the issue between the intervenors claimants thereto, shall not have been determined, be applied to the payment in full of the entire amounts due for principal and intrest upon the Felton and Robinson certificates and any other certificates hereafter issued by the Receiver under the order of the court; and it is hereby provided that all the directions of this decree heretofore made in respect to the Felton and Robinson certificates now outstanding shall apply in the favor of the persons holding certificates hereafter to be issued, whether under existing authority or authority hereafter to be given; the said certificates shall be presented and shall upon payment be by the said Special Master cancelled.

(3) Such proceeds shall next be applied to the payment of the liens of Jonas M. McCune, Jacob Klee, The Second National Bank of Sandusky, and Horatio Atchinson, guardian, as out in Paragraphs XXVII, XXVIII, XXIX and XLVI.

(4) An amendment of said proceeds equal to all demand indicated claims including Monsarrat certificates for which liens prior to the prior lien mortgage are now assessed, which accumulated with interest shall next be paid into court to satisfy said claims when and as they may be finally allowed or to be distributed as next hereinafter provided when and as such claims are finally disallowed.

(5) Such proceeds shall next be applicable to the payment in full of the entire amounts due for principal and interest on the outstanding bonds secured by the prior Lien Mortgage, as follows:

(*a*) That portion of such proceeds as shall be applicable to the payment of the twelve hundred thousand ($1,200,000.00) dollars of such bonds referred to in Paragraph III and the interest thereon according to the interest calculations in and the provisory of Paragraph IV, hereof shall be distributed upon presentation of said bonds and the interest warrants or coupons respectively which shall upon payment be by said Special Master cancelled.

(*b*) That portion of such proceeds as shall be applicable to the payment of the eight hundred thousand ($800,000.00) dollars of said bonds referred to in Paragraph III hereof, and the interest thereon calculations in Paragraph IV hereof, shall be applicable to the payment of said Monsarrat certificates and the interest thereon and such other claims as may be
235 ordered to be paid out of the proceeds of said bonds pursuant to the provisions of Paragraph XXXII. Should said Monsarrat certificates be paid in full hereunder, they shall be cancelled by the Master.

(6) Such proceeds shall next be applied to the payment in full of the entire amounts due for principal and interest on the bonds secured by the General Mortgage upon presentation of said bonds and the interest warrants or coupons respectively, which shall upon payment be by said Special Master cancelled, and shall next be applied as provided in Paragraph XLVI hereof.

(7) If in any application of the proceeds in subdivision 4 and 5 above directed the same shall not be sufficient to discharge in full the indebtedness therein directed to be paid the same shall be applied to the payment in full or ratably, first, of interest and accrued interest upon the principal at the date of sale, and, secondly, of the principal. Such bonds, certificates, interest warrants or coupons as shall be partly paid, shall be stamped as partly paid and returned to the holders thereof.

(8) If, after making all the payments, herein directed to be made there shall be a surplus, then the same shall be applied to the payment of liens on the order of their priority as herein determined or as the court may order and direct.

Whenever the Special Master shall be prepared out of the proceeds of sale to pay any of the bonds or coupons to be paid as above specified, he shall, upon request of the solicitors of the trustee under the mortgage securing the bonds so to be paid, give notice of the time when, and the place where, he will be prepared to make such payment, by publication at least once a week for two successive weeks in at least one newspaper in each of the following cities, viz: New York, N. Y., and Columbus, Ohio.

XXIV. It is further ordered, adjudged and decreed that upon payment of the purchase price bid by the purchaser in accordance with the provisions of this decree, the said Special Master shall execute proper deed or deeds, conveying and assigning the railroad, properties and franchises to such purchaser, or his successor or assigns, and upon the execution and delivery of such deed or deeds, the grantee therein shall be let into possession of the premises conveyed and the receivers shall deliver any of the premises sold which may be in their possession over to the purchaser, his successors or assigns, to-
236 gether with any monies, property and net income, if any, acquired or received by the receivers since the commencement of this suit and up to the date of such delivery of possession, in the management or operation of the mortgaged premises embraced in such conveyance, without, however, prejudice to such rights as may exist in favor of holders of preferential claims to have any net earnings of the receivership applied to the payment of their claims.

Until the conveyance to the purchaser, his successors or assigns, of the mortgaged premises sold under this decree, the receiver shall continue in possession thereof and discharge the duties imposed upon him by the order of his appointment, with the rights and powers thereby conferred, including the right to issue receiver's certificates in accordance with any orders of this court; he shall keep a correct account of the earnings and income of the premises accruing after the date of said sale, and, if the sale shall be confirmed, the purchase- on delivery of possession by the receiver, shall, as hereinbefore provided, be entitled to receive the net income and earnings accruing subsequent to the date of the sale and the proceeds of such income and earnings, without prejudice as aforesaid.

The purchaser of the railroad property and franchises and his successors or assigns, respectively, after such delivery of the premises shall hold, possess and enjoy the same and all the rights, privileges, immunities and franchises appertaining thereto, as fully and completely as said defendant, The Columbus, Sandusky and Hocking Railroad Company or its receivers now holds or enjoy the same, or held or enjoyed, or was entitled to hold or enjoy the same, at the time of the acquisition of the title to the said premises and of the execution of the said prior lien and general mortgages, or at any time since, and the purchaser and his successors and assigns, respectively, shall be entitled to have and to hold the premises so conveyed free and discharged from the claims, liens and encumbrances of all parties and claimants, and those claiming under them, in this consolidated cause save the floating indebtedness of Felton and Robinson, receivers, which shall be assumed by the purchaser.

XXV. It is further ordered, adjudged and decreed at the time of delivery of any such deed by the Special Master, the receiver shall make, execute and deliver to the purchaser of said railroad, properties and franchises his successors and assigns, a good and sufficient deed or deeds of convey-
237 ance of any and all property of the defendant railroad company including any and all appurtenant to said premises, or acquired for use in connection with or for the purposes of said railroad and properties, including all rolling stock and engines, floating and other equipment, required by said receiver.

The said Special Master is hereby required promptly to make a full report of his proceedings under the order of sale herein and from time to time such supplementary reports as may be necessary or desirable to show fully his action in the premises.

XXVI. It is further ordered, adjudged and decreed that in case the proceeds of such sale applicable to the payment of

said bonds, interest and coupons shall not be sufficient to pay in full the amounts hereinbefore found to be due thereon for principal and interest, then the said Special Master shall report to the court the amount of the deficiency or deficiencies and shall specify the parties to whom such deficiency or deficiencies are payable, and on the confirmation of said report the respective parties who may be entitled thereto shall have judgment against the defendant, The Columbus, Sandusky and Hocking Railroad Company for the amount of the deficiency or deficiencies due them respectively, and shall have execution therefor, pursuant to the rules and practice of this court.

XXVII. And it is further ordered, adjudged and decreed that the claim of the defendant Jonas M. McCune, as set forth in his answer and cross-petition, filed herein on the 28th day of December, 1898, is a good and valid claim and a first lien upon that part of the property of the defendant Railroad Company situated in the city of Bucyrus, in the County of Crawford, in the State of Ohio, and bounded and described as follows:

The east part of the northwest part of the northeast quarter of section twelve (12), Township three (3), south of Range sixteen (16) east, commencing at a stone on the north line of said quarter-section 5 28-100 chains east of the northwest corner thereof and running thence north 85 degrees, 30' east 5 28-100 chains to a stone; thence south 2:45' east 11. 37-100 chains to a stone; thence south 85:30', west 5 28-100 chains to a stone; thence north 2.45', west 11. 37-100 chains to the place of beginning, containing six (6) acres, more or less, being subject to all legal highways, the same being out lot No. 217 revised numbers in said city of Bucyrus.

That the amount of the said lien is the sum of two thousand seven hundred and eleven and 85-100 dollars ($2,711.85),
238 with interest thereon from January 30th, 1898, at the rate of six per centum per annum; that any purchaser of the property of the defendant Railroad Company shall take this part thereof subject to the aforesaid lien and subject to the right of the said Jonas M. McCune, at any time to have this part of the said defendant Railroad Company's property sold free and clear of all encumbrances, for the payment of the said debt.

XXVIII. And it is further ordered, adjudged and decreed, that the claim of the defendant Jacob Klee, as set forth in his answer filed herein on the twentieth day of January, 1899, is a good and valid lien upon the following lands and tenements situated in the city of Delaware in the county of Delaware, in the State of Ohio, and known by the following description:

Being part of subdivision "E" of the original out lot No. 1,

bounded as follows: Beginning at the southeast corner of subdivision "D" in the north line of William Street, being at the southwest corner of said lot "E", thence east on the north line of William street fifty (50) feet; thence north on the middle line of said out lot, the same being the north line of said lot "E", thence west fifty (50) feet; thence south to the place of beginning, being fifty feet wide off the west side of the premises conveyed to A. Blymyer by I. J. Richardson and wife, July 24, 1867, excepting therefrom a strip two (2) feet wide from off the west side of said lot and running back within twenty (20) feet of the back or north end of said lot, which is reserved from the condition of this deed, be the same more or less, but subject to all legal highways.

That the amount of the said lien is seven hundred and eighty-three and 50-100 ($783.50), with interest thereon from the 8th day of February, 1898, at the rate of six per centum per annum; that any purchaser of the property of the defendant Railroad Company shall take this part thereof subject to the aforesaid lien and subject to the right of the said Jacob Klee at any time to have this part of said defendant Railroad Company's property sold, free and clear of all encumbrances, for the payment of the said debt.

XXIX. It is further ordered, adjudged and decreed, that the exceptions of Joseph Robinson, receiver, and of the Metropolitan Trust Companies herein to the finding of the Master that the Second National Bank of Sandusky, is entitled to a lien upon the following described property; situated in the city of Sandusky, Erie County, Ohio, known as parts of outlots Nos. 24, 32 and 33, and bounded and described as follows:

239 Beginning at the N. E. corner of the out-lots numbered 24 of Darling's survey, of a 364-acre tract of Isaac Mills' estate, west of the City of Sandusky, Portland Township, Erie County, State of Ohio; thence S. 2 deg. 30' East 515.5 feet to a point on the N. right of way line of the Lake Shore & Michigan Southern Railway Company right of way; thence north 83, deg. 08' W. 802.4 feet along said right of way line to a street; thence north 2 deg. 30' W. 413.2 feet S. right of way line of the Cleveland, Cincinnati, Chicago and St. Louis Railway right of way; thence N. 52 deg. 58' S. 485 feet to a point on dividing line between outlots numbers 32 and 25 of said tract; thence south 2 deg. 30' E. 294 feet along said dividing line to the common corner of outlots 32, 25, 24 and 33 of said tract thence S. 89 deg. 13' E., 395.2 feet to a point of beginning and containing (9.96) nine and ninety-six one-hundredths acres more or less. Being the same real estate conveyed to the defendant, Ed. H. Zurhorst, by the deed of George Marshal and Elizabeth, his wife, filed for record on Nov. 7, 1892, with the recorder of Erie County, Ohio.

Also the following real estate in the city of Sandusky, Erie County, Ohio, situated in the city of Sandusky, County of Erie, and State of Ohio, and known as parts of outlots Nos. 25 and 9, beginning at the common corner of outlots Nos. 24, 25, 32 and 33 of Darling's survey of a 364-acre tract, Issac Mills' estate, west of the city of Sandusky, in Portland Township, Erie County, State of Ohio, and extending thence south 89 deg. 13' E. 395.2 feet to a street; thence N. 2 deg. 30 W. 251.8 feet along west side of said street; thence south 57 deg. 20' W. 485.2 feet to a point of beginning and containing (1.14) one and fourteen hundredths acres; also, beginning at a point S. 89 deg. 31' E., 345 feet from S. W. corner of out lot number 9; thence N. 52 deg. 04' E. 364.9 feet to middle of Mills Creek thence at right angle S. 37 deg. 56' E. 68 feet, thence at right angles S. 52 deg. 04' W'. 262.6 feet; thence N. 89 deg. 31' W., to point of beginning and containing (.63) sixty-three hundredths acres, be the same more or less, but subject to all legal highways.

Are overruled and it is adjudged that the said Second National Bank has a lien upon the said property first described in this paragraph being the tract of 9.96 acres, conveyed by said George H. Marshall and wife, and no other prior to that of any part or claimant in this suit, to secure the payment of $5,379.90, with interest at 7 per cent. per annum from October 1, 1893, to December 13, 1898, and whereas, at the same rate from and after February 6th, 1900, less the sum of $744.85 heretofore paid to said Zurhorst by way of interest. It
240 is further adjudged that the said Zurhorst holds the said property as trustee for the defendant Railroad Company subject to the aforesaid lien of the Second National Bank and of the Prior Lien and General Mortgages hereinbefore described in the order named, and it is further adjudged that the said property be sold with and as a part and parcel of the railroad property hereinbefore described, in satisfaction of the aforesaid liens and the said Zurhorst on the confirmation of the said sale executed a conveyance to the purchaser thereof, or in default of so doing, that the deed of the Special Master hereinbefore appointed to make the sale and execute to said purchaser a deed, shall operate as such conveyance and pass to the purchaser all the said right, title and interest of said Zurhorst.

And it is further adjudged that Hewson L. Peeke, John H. Waginet, D. L. C. Ransom, Guardian of Webster H. Ransom and Ross D. Ransom, minors, Frank Stang, A. W. Prout and James Flynn, have no lien upon any part of the property of the defendant Railroad Company.

And it is further adjudged that Henry C. Strong and Rush

R. Sloane, having filed answers disclaiming any interest in the aforesaid property, are hereby dismissed from this cause.

And it is further adjudged that the report of the said Master with reference to the said property and the respective claimants thereto, except as in this paragraph modified, is in all respects confirmed, and all exceptions not in conformity with the provisions of this paragraph are overruled and dismissed.

XXX. And it is further ordered, adjudged and decreed, that the intervening petitions of John McCune, Edward K. Stewart and of George T. Jarvis, Receiver of the Louisville, Evansville and St. Louis Consolidated Railroad Company, and the Cleveland Terminal & Valley Railway Company are dismissed for want of equity at their costs, and that the exceptions of the said parties to the Master's report filed herein Sept. 25, 1899, are overruled except as herein otherwise ordered; and it is adjudged that none of said parties has any lien upon any of the property herein described.

XXXI. Pursuant to the former decisions of this court and of the Circuit Court of Appeals it is further adjudged that the demurrers of the intervening petitions of John G. Carlisle, Charles S. Hinchman and Joseph F. Randolph, are susained and the said petition is dismissed for want of equity and
241 that the exceptions of the said parties to the master's report save as herein otherwise provided are overruled; and it is adjudged that none of said parties has any lien upon any of the property herein described except as General Mortgage bondholders.

XXXII. And it is further ordered, adjudged and decreed that the exceptions of the Metropolitan Trust Company in its own right and of the defendant F. G. Hallett, as holders of Monsaratt Certificates, to the report of the master filed herein Sept. 25, 1899, are overruled. That the intervening petition of the Metropolitan Trust Company in its own right filed herein on the 9th day of March, 1900, as by leave of this court amended by amendment filed on the same day, is dismissed in so far as it prays that its Monsarrat Certificates shall be fully paid and satisfied out of the proceeds of sale hereinbefore any portion of said proceeds shall be devoted to the payment of any interest or principal of the Prior Lien Bonds. That the relief prayed for by the defendant F. G. Hallett in his answer herein as originally filed in so far as said answer prayed that by virtue of his Monsarrat Certificates he be decreed a lien upon the property herein foreclosed prior to any lien or claim upon the said property is denied.

And it is further ordered, adjudged and decreed that it is referred to H. M. Butler, who is hereby appointed Special Master to inquire into and report upon any claims against said

eight hundred (800) Prior Lien bonds hereinbefore in Paragraph III, referred to, and against the scrip*t* therefore; that the said Master give notice which shall be published once a week for two successive weeks in one newspaper of general circulation in the City of Columbus, Ohio, and one newspaper of general circulation in Bucyrus, Ohio, Crawford County, requiring all persons claiming an interest in the said eight hundred (800) Prior Lien Bonds of The Columbus, Sandusky & Hocking Railroad Company, numbered 1201 to 2000, both inclusive, or claiming an interest in the scrip*t* for said bonds deposited with the Clerk of Common Pleas Court, of Crawford County, Ohio, pursuant to an order in an action in said court brought by the Metropolitan Trust Company of the City of New York, Trustee, against the Columbus, Sandusky & Hocking Railroad Company, to produce and prove the same before the said Special Master on or before a date to be fixed by him which shall be as soon as practicable, such notice shall not apply to the said Metropolitan Trust Company and F. G. Hallett, but they shall have notice of all hearings before the said Master. That the said
242 Master shall as soon as possible report to this court as to all claims against the said Prior Lien Bonds and against the said scrip*t*, and as to the distribution which should be made of the proceeds of sale applicable to the payment of the said eight hundred (800) Prior Lien Bonds.

And it is further ordered, adjudged and decreed that distribution shall be made in accordance with the provisions of the clause of the decree of the Crawford County Common Pleas Court relating to said eight hundred bonds as construed by the decree herein and as equity may require except as the application of the decree of said Crawford County Common Pleas Court to said 800 bonds now in the possession of said George W. Sinks, Trustee, may be hereafter successfully contested by the said Sinks, Trustee, and other claimants not parties hereto before the Master and this court.

It is further ordered, adjudged and decreed that the provisions of this decree as to the right of the holders of said Monsaratt Certificates to be paid out of the proceeds of sale applicable to the payment of the said eight hundred (800) bonds as in Paragraph XVII adjudged, shall be binding and controlling upon said Master as to all claims presented to him by any party to this cause or exceptors to the report of H. M. Butler, Master, but none of its provisions shall be binding upon George W. Sinks nor any other person not parties to this cause who may become claimants upon said bonds under this paragraph.

XXXIII. It is further ordered, adjudged and decreed that the exceptions of Arnold & Morton, New York, Chicago and St. Louis Railroad Company; Clinton National Bank; Grand

Trunk Railway Company; Wabash Railroad Company; Park Brothers & Company (Limited); P. McCune, Trustee, Charles Parrott, *et al.*; W. P. Little, *et al.*; George W. Sinks and of all other persons who filed exceptions to the Master's report filed herein on Sept. 25, 1899, save as herein otherwise ordered are overruled and that the said report as to the said claims is in all respects confirmed. That none of the said claimants has any lien upon any of the property herein described.

*But it is adjudged that John P. McCune*, as trustee, for himself and others, is entitled to stand in the shoes of sundry employes of the Columbus, Sandusky and Hocking Railroad Company and to assert all the rights which the said employes has as to certain labor claims assigned by them to him.

But the exceptions of Wm. P. Little, *et al.*, and of
243 Geo. W. Sinks to so much of the master's findings in his report of September 25, 1899, as holds that the Columbus, Sandusky & Hocking Railroad Company, is a corporation organized under sections 3393 to 3398, inclusive, Revised Statutes of Ohio, are sustained.

It is further ordered that the demurrers of the Mercantile and Metropolitan Trust Companies to the intervening petition of Chase Andrews, as Receiver of the Zanesville Terminal Railroad Company heretofore filed in this cause are sustained and that the said intervening petition is dismissed.

XXXIV. It is further adjudged that the exceptions of Theodore Leonard to the Master's report in so far as the said Master finds that he has no lien upon any of the property herein described are overruled; but the case is referred back to the Master to report whether he has a lien upon the money collected by S. M. Felton, Receiver, from the Hallwood Cash Register Company, and it is ordered that the cost of said reference be paid by said Leonard.

XXXV. It is further ordered, adjudged and decreed that the exceptions of E. M. Poston, D. L. Sleeper and M. H. Donohue to the said Master's report are overruled in so far as the said Master found that the claims of the said parties were not a lien upon any of the property herein described; but the said exceptions are sustained in so far as the said Master found that the claim was not one against The Columbus, Sandusky & Hocking Railroad Company, but merely against the receivers thereof. And it is now adjudged that the said claimants have not a lien upon any of the said property herein described but have a general claim against the said Railroad Company for the amount found due them in said Master's report.

XXXVI. The first exception of the Ensign Manufacturing Company to the report of the Master is sustained, it appearing from the further evidence submitted by said company, by leave

of court, that its said claim for $1,072.98 occurred within six months prior to the appointment of S. M. Felton, as Receiver. The other exceptions of said Ensign Manufacturing Company to the report are overruled.

XXXVII. It is further ordered, adjudged and decreed that the intervening petition of W. S. Gregg so far as said intervening petition seeks to have said claim allowed as a six months' claim be and the same is hereby sustained and said claim is allowed as a six months' claim accordingly; and that as to the matter of interest on said claim said exception to the Master's report be and the same hereby is sustained and interest on said claim of W. S. Gregg is allowed as claim in said exception and his intervening petition.

244

And it is further ordered, adjudged and decreed that as to the claims of the said W. S. Gregg, The Adams & Westlake Company; William Harland & Sons; Hann & Adair; The National Tube Works; Pittsburg Forge & Iron Company; Harmon & Robinson, Receivers of the Baltimore & Ohio Southwestern Railway Company, Louisville & Nashville Railroad Company; Indiana, Decatur & Western Railway Company, U. S. Bronze Company; N. & G. Taylor Company; Cincinnati, Hamilton & Dayton Railway Company; Merchant & Company; E. E. Shedd & Company; Standard Scale & Supply Company; Charles Scott Spring Company; S. M. Kinsey, executrix; and the E. A. Kinsey Company, the report of the Special Master, H. M. Butler, upon the subject of diversion be reopened, and that the said matter of diversion, in so far as it effects the claims in this paragraph mentioned, be, and the same hereby is, re-referred to the said H. M. Butler, as Special Master, to take proof and report to this court the amount of the diversion, if any, of the current earnings of the Railroad Company for the benefit of the Prior Lien and General Mortgage bondholders within a period commencing six months prior to the time when the claim heretofore in this paragraph mentioned were incurred and the amount of funds during the same period of time derived by the railroad company from other sources than current earnings. In considering this matter the said Special Master shall be guided in particular by the opinion of the Circuit Court of Appeals in the matter of the appeal herein of Winfield S. Gregg, said appeal being No. 858. The rules of evidence made applicable to the reference heretofore made in this cause will apply and the Master will file his report on or before January 1st, 1902, leave is hereby given to the parties of this cause and the claimants above mentioned to apply to this court at the foot of this decree, upon the confirmation or

modification of the said report, for a proper order embodying in this decree the action of this court upon the said report.

XXXVIII. It is further ordered that the claim of W. E. Guerin, filed in this cause on the —— day of ——, be stricken from the files, and it is adjudged that the said Guerin has no lien whatsoever upon any of the property herein described.

XXXIX. It is further ordered, adjudged and decreed
245 that the intervening petition of Nicholas Monsarrat, Receiver of the Columbus, Hocking Valley & Toledo Railway Company is dismissed, and his exceptions to the findings of the Master in his report filed herein September 25, 1899, are overruled, and it is adjudged that the said Monsarrat, Receiver, by virtue of his two judgments rendered against the defendant Railroad Company, April 12, 1897, for $1,046.36, and September 26, 1897, for $1,820.34, both in the county of Franklin, State of Ohio, has a lien upon the real property then in the possession of the said Felton, Receiver, situated in the said county upon the dates of the said judgments; but that said lien is junior and inferior to the liens of the Prior Lien and General Mortgages and the liens adjudged prior thereto.

XL. It is further adjudged, that the defendant the Railroad Equipment Company has the legal title to the following described rolling stock: two (2) Mogul locomotives, cylinder, 19 x 24 inches, built by the Pittsburg Locomotive Works, railroad numbers 20 to 29, inclusive, owner's plate numbers 1 and 2; six (6) passenger cars, railroad numbers 20 to 25, inclusive, owner's plate numbers 1 to 6, inclusive, two (2) baggage and mail cars, railroad numbers 14 and 15, owner's plate numbers 7 and 8; two (2) consolidated locomotives, cylinder 20 x 24, owner's plate numbers 1 and 2; (2) two Mogul locomotives, cylinders 19 x 24, built by the Pittsburg Locomotive Works, owner's plate numbers 3 and 4; one hundred (100) gondola cars, twenty (20) ton capacity; owner's plate numbers 5 to 1004, built by Pennock Bros., Minerva, Ohio, and that there is now due the said Equipment Company upon its lease warrants upon said rolling stock the sum of fifty-one thousand, four hundred and 65-100 ($51,400.65) with interest and the same is not subject to the lien or claim of any party or claimant in this cause (except the equitable lien of Felton and Robinson Certificates so far as proceeds of same may have been expended in preserving or improving the said equipment); it is ordered that the said property be sold, together with the other property herein described, the full amount of the claim of said Equipment Company as aforesaid to be paid out of the proceeds of the sale as herein ordered. But the provisions of this paragraph are without prejudice to the rights if any of Arthur and Emile Levita, partners as Levita & Company under and by virtue of their writ of attachment and garnishment served

upon the receiver in this cause, and without prejudice to the rights of any persons claiming title to this fund or any
246 part thereof under said Equimpent Company.

XLI. It is further ordered, adjudged and decreed that the exceptions of the Galena Oil Company to the said Master's report are overruled in so far as the said Master finds that the said claim is not entitled to any lien upon any of the property herein described; but that the said exceptions are sustained to the extent that the credit of $247 was applied by the Master in reduction of the account due the said company for oil furnished to the Railroad Company within six months prior to the appointment of a receiver in this cause; and it is adjudged that the said Oil Company is entitled to apply the said credit upon the indebtedness due the said Oil Company accruing prior to the said six months' period, and that the amount due the said Oil Company from the said Railroad Company for supplies furnished within the said six months' period is $1,883.72.

XLII. It is further ordered, adjudged and decreed that the said Master's supplemental report filed herein, wherein he finds that the amount of the claim due S. M. Kinsey, executrix, from the Railroad Company, shall be reduced by $4,096.71, which said amount should be added to the amount found to be due to E. A. Kinsey Company, is confirmed, making the totals now found due to the said S. M. Kinsey, executrix, and E. A. Kinsey Company, respectively, $982.17 and $12,860.53.

XLIII. It is further ordered, adjudged and decreed that the exceptions of Joseph Robinson, Receiver herein, of the Metropolitan and Mercantile Trust Companies, and of F. G. Hallet and Joseph F. Randolph, *et al.*, to the finding of the Master allowing a lien in favor of Gertrude Hesse, administratrix of Neil Hesse, upon all of the property in possession of S. M. Felton, Receiver, as of March 20, 1899, are sustained; and it is adjudged that the said Gertrude Hesse has not any lien upon any of the property herein described prior to or superior to the lien of the Prior Lien and General Mortgage and the liens herein adjudged prior thereto. But that said Gertrude Hesse, administratrix, has a subordinate lien upon the property in the hands of the Receiver of the said Railroad Company upon March 20, 1899, situated in the County of Perry, Ohio.

XLIV. It is further ordered, adjudged and decreed that except as herein modified the amounts set out in column of six of the Master's report of September 25th, 1899, Schedule Exhibit A1, pages 27 to 36 of his printed report, inclusive, are the true and correct amounts accruing to the claimants as
247 set out in the said Schedule Exhibit A1, within six months prior to the appointment of S. M. Felton as Re-

ceiver in this cause and that interest upon the said claims runs from the dates found by the said Master in Schedule Exhibit A2 of said report.

XLV. It is further ordered, adjudged and decreed that all persons who have failed to present their claims before the Master as provided by the order of February 20, 1899, are forever barred from asserting any lien upon any of the property herein described; and that all persons who appeared or presented claims before the said Master under the order of July 8, 1899, and the amendments thereto, except as herein otherwise ordered, are declared to have no lien upon any of the property hereinbefore described, and are forever barred from asserting any lien upon the said property at any time hereafter.

XLVI. And it is further ordered, adjudged and decreed on the pleadings and stipulation hereinafter in this paragraph referred to that the mortgage made by David S. Gray and Virginia D. Gray, his wife, to the defendant, George W. Sinks, as trustee, to secure the payment of two hundred thousand dollars ($200,000) represented by two hundred (200) notes of the Columbus, Shawnee & Hocking Railway Company for one thousand dollars ($1,000) each which mortgage was made under date June 1st, 1892, is a valid lien inferior in lien to prior lien mortgage and to the General Mortgage hereinbefore described upon the following property:

Beginning at an iron pin in the center of St. Clair avenue, 307 feet north of the center of Leonard avenue; thence north 89 degrees 36' west 1312 and 89-100 feet to an iron bolt in the center of a 20 foot alley parallel to the Harbor road; thence north 37 degrees 44' east 597 and 66-100 feet along said alley to an iron bolt; thence south 86 degrees 56' east 973 and 45-100 feet to an iron pin in the center of St. Clair avenue 491 and 22-100 feet, to the place of beginning, being an original tract of land 12 89-100 acres in the name of Sarah Shoemaker. Also lots Nos. eight (8), nine (9), ten (10), thirteen (13), and fourteen (14), of Sarah Shoemaker's addition to Clinton Township, Franklin County, Ohio. All fronting on Harbor road, in said township, and containing 1 37-100 acres. Said 12 89-100 tract and said lots containing 1 37-100 acres, aggregating 14 26-100 acres. Excepting from said lands and lots the 1 80-100 acres, which has been dedicated for street purposes on the south side of said lands, amounting in the aggregate to 1 43-100
248 acres, leaving 11 03-100 acres absolutely; and also conveying all the interest in Clinton avenue and a 20 foot alley, subject only to any interest the public may have by reason of the dedication heretofore by Sarah Shoemaker, having been made. All of said premises hereinbefore described being in Clinton Township, Franklin County, Ohio.

Also a strip of land, being the fourth quarter of the first township and eighteen (18) range of the U. S. Military lands, beginning on the east boundary line of the lands conveyed by Theodore Leonard, assignee to Sarah Shoemaker, by deed recorded in the record of deeds of Franklin County, aforesaid, in Volume 137 at pages 409 and 410, at an iron bolt at the southeast corner of a parcel of land conveyed by Christopher and Sarah A. Shoemaker, to Franklin P. Shoemaker, on or about the fifteenth day of March, 1890; thence with the southern line of said last named track of land north 87 degrees 29' west 1442.37 feet to an iron bolt planted in the center of St. Clair avenue south 2 degrees 56' west 301 80-100 feet to an iron bolt; thence south 87 degrees 29' east 1444.25 feet to the eastern boundary of said Sarah A. Shoemaker's land; thence north 2 degrees 24' east with said eastern boundary line 30180-100 feet to the place of beginning, containing ten (10) acres of land, it being the same premises heretofore conveyed by Christopher Shoemaker and wife to William H. Shoemaker by deed dated 11th day of April, 1885, and recorded in deed book No. 179, pages 95 and 96 of the record of deeds in Recorder's office, Franklin County, Ohio.

Also a strip of land, situated in Clinton Township, Franklin County, Ohio, described as follows, to-wit: Beginning at an iron pin in the center of a 20 foot alley east and parallel to the Harbor road and being at the northwest corner to a 12 89-100 acre tract of land owned by Sarah Shoemaker; thence along the north line of said 12 89-100 acre tract, south 86 degrees 56' east 973 45-100 feet to an iron pin in the center of St. Clair avenue; thence along the center of St. Clair avenue north 3 degrees 05' east 252 40-100 feet to an iron pin in said 20 foot alley; thence south 86 degrees west 750 9-100 feet to an iron pin in said 20 foot alley; thence south 38 degrees 33' west 337 04-100 feet to the place of beginning, containing five acres of land and being the south half of a ten acre tract of land owned by Devoice Shoemaker.

And it is further ordered that said property be sold, together with the railroad property herein described as a part
249 and parcel thereof. If the proceeds of the sale of the entire property be more than sufficient to pay the Prior Lien Mortgage and the General Mortgage herein described, together with all claims and liens herein adjudicated prior thereto, including the Felton and Robinson certificates, the costs of this action and *and* the claims of Horatio Atchison, guardian, hereinafter referred to, then out of the said surplus proceeds, it is ordered that the interest and principal of the mortgage of D. S. Gray to Geo. W. Sinks as above defined be first paid; any surplus after such payment to be paid as the court may hereafter order.

And it is further adjudged that the demurrers of said Geo. W. Sinks, Trustee, to the ancillary and dependent bill of the Metropolitan Trust Company as amended and to the cross bill of the Mercantile Trust Company filed against said Sinks, Trustee, be and hereby are overruled.

And it is further adjudged that Horatio S. Atchison, as guardian of the personal property of Alfred K. Atchieson, is entitled to a first and prior lien upon that portion of the property in this paragraph described bounded as follows:

Being in the fourth quarter of First Township and Eighteenth Range of U. S. M. lands, beginning at an iron bolt at the southeast corner of a parcel of land conveyed to Christopher P. Shoemaker; thence with the southern line of said last named tract of land N. 87 degrees 29' W. 1442.37 feet to an iron bolt planted in the center of St. Clair avenue, S. 2 degrees 56' W. 301.80 feet to an iron bolt; thence S. 87 degrees 29' E. 1444.25 feet to the eastern boundary of said Sarah A. Shoemaker's land; thence N. 2 degrees 44' E. with said eastern boundary line 301.80 feet to the place of beginning, containing ten acres of land.

And it is ordered, that out of the cash payment made by the purchaser of the entire property said claim amounting to $1,500, together with interest thereon from the 18th day of June, 1899, at the date of six per cent. per annum, be paid in full.

XLVII. The exception of Joseph Robinson, Receiver, to the Master's Supplemental Report No. 2 is sustained.

XLVIII. It is further adjudged that the exceptions of Harrison, Olds & Henderson and of Gilbert H. Stewart in so far as the Master in his report filed September 25, 1899, found that the said claimants were not entitled to a lien on any of the property herein described are overruled and it is
250 adjudged that said claims are not entitled to rank as six months' claims.

XLIX. And it is further ordered, adjudged and decreed that the exceptions of George W. Sinks, Trustee, to the report of the Master filed herein September 25th, 1899, are overruled in so far as they except to the Master's findings that they are not a lien upon any of the property herein described.

L. And it is further ordered, adjudged and decreed as follows:

(a) That the appellant Winfield S. Gregg recover the cost of his appeal, the same being No. 858, the said costs being taxed at from the Metropolitan Trust Company of the City of New York, as trustee, the Mercantile Trust Company of New York, as trustee, and the receiver in this cause, jointly and severally.

(*b*) That the Metropolitan Trust Company of the City of New York, as trustee, and the Mercantile Trust Company of New York, as trustee, each recover its costs of the appeal No. 859, the same being severally taxed at and from John P. McCune, appellant therein.

(*c*) That the Metropolitan Trust Company of the City of New York, as trustee, each recover its costs of the appeal No. 860, the same being severally taxed at and from Edward K. Stewart, appellant therein.

(*d*) That the Metropolitan Trust Company of the City of New York, as trustee, recover the costs of the appeal No. 861, the same being taxed at from Geo. W. Sinks, trustee, appellant therein.

(*e*) That the Metropolitan Trust Company of the City of New York, as trustee, and the Mercantile Trust Company of New York, as trustee, each recover its costs of the appeal No. 862, the same being severally taxed at and from John P. McCune, as trustee, for himself and others, appellant therein.

(*f*) That the Metropolitan Trust Company of the City of New York, as trustee, and the Mercantile Trust Company of New York, as trustee, each recover its costs of the appeal No. 863, the same being severally taxed at and William P. Little, Jonas M. McCune, James Watson, Thomas D. Huntington, Charles Parrott, David S. Gray and Edward K. Stewart, appellants therein, jointly and severally.

(*g*) That the Metropolitan Trust Company of the City of New York, as trustee, and the Mercantile Trust Company of New York, as trustee, each recover its costs of the ap-
251 peal No. 864, the same being taxed at and from Charles Parrott, Frederick J. Picard, James M. McCune, George W. Sinks, H. R. Hislop, John R. Hughes, William P. Little, Edward K. Stewart, James Watson, David K. Watson, Charles E. Burr, Howard C. Park, Eloise F. King, David S. Gray and Herbert Brooks, appellants therein, jointly and severally.

(*h*) That the Metropolitan Trust Company of the City of New York, as trustee, and the Mercantile Trust Company of New York, as trustee, each recover its costs of the appeal No. 865, the same being severally taxed at and from the Columbus Terminal & Transfer Railroad Company, appellant therein.

(*i*) That the Metropolitan Trust Company of the City of New York, as trustee, and the Mercantile Trust Company of New York, as trustee, each recover its costs of the appeal No.

866, the same being severally taxed at and from Harrison, Olds & Henderson, appellants therein.

That the cost of the appeal No. 867 taxed at $ be paid one-half thereof by Joseph Robinson, Receiver, and one-half thereof by the appellants John G. Carlisle, Charles H. Henchman and Joseph F. Randolph, and it is ordered and adjudged.

(*k*) That the appellant Adams & Westlake Company recover the costs of the appeal No. 868, the same being taxed at from the Metropolitan Trust Company of the City of New York, as trustee, the Mercantile Trust Company of New York, as trustee, and the Receiver in this cause, jointly and severally.

(*l*) That the Railroad Equipment Company and the Second National Bank of Sandusky each recover its costs of the appeal No. 870, the sum being severally taxed at and from the Metropolitan Trust Company of the City of New York, as trustee, and one-fourth from George W. Sinks, trustee, That the same Metropolitan Trust Company, as trustee, recover one-fourth its costs of said appeal taxed at $ .

(*m*) That the Metropolitan Trust Company of the City of New York, as trustee, each recover the cost of the appeal No. 875, the same being severally taxed at and from Gilbert H. Stewart, appellant herein.

(*n*) That the appellant, Baltimore & Ohio Southwestern Railroad Company, recover the costs of the appeal No. 876, the same being taxed at from the Metropolitan Trust Company of the City of New York, as trustee, the Mercantile Trust Company of New York, as trustee,
252 and the Receiver in this cause, jointly and severally.

(*o*) That the appellant, the Louisville & Nashville Railroad Company, recover the costs of the appeal No. 877, the same being taxed at from the Metropolitan Trust Company of the City of New York, as trustee, the Mercantile Trust Company of New York, as trustee, and the Receiver in this cause, jointly and severally.

(*p*) That the appellant the Railroad Equipment Company, recover its costs of the appeal No. 886, the same being taxed at from the funds in the hands of the Receiver in this cause.

(*q*) That the Railroad Equipment Company and the Second National Bank of Sandusky each recover its costs of appeal No. 907, the same being severally taxed at and from the Mercantile Trust Company of New York, as trustee.

(*r*) That the Metropolitan Trust Company of the City of New York, as trustee, the Mercantile Trust Company of New York, as trustee, Joseph Robinson, the Receiver in this cause,

John G. Carlisle, *et al.*, each recover its costs of appeal No. 908, the same being severally taxed at and and and from the Metropolitan Trust Company of the City of New York in its individual right.

(*s*) That the Metropolitan Trust Company of the City of New York, as trustee, the Mercantile Trust Company of New York, as trustee, Joseph Robinson, the Receiver in this cause, John G. Carlisle, *et al.*, each recover its costs of the appeal No. 909, the same being severally taxed at and and and from F. G. Hallett.

(*t*) That the Metropolitan Trust Company of the City of New York, as trustee, and the Mercantile Trust Company of New York, as trustee, each recover its costs of appeal No. 910, the same being severally taxed at and from the Cleveland Terminal & Valley Railroad Company, appellant therein.

LI. And it is further ordered, adjudged and decreed that all questions not hereby disposed of, including the discharge of the Receiver and the settlement of his accounts, are hereby reserved for future adjudication. That any party that heretofore duly filed his bill claim cross bill, answer or petition herein, and any holder of any indebtedness contracted by the Receiver, or by the defendant Railroad Company, may at any time apply to this court at the foot of this decree for further relief, as well as for such modifications thereof in re-
253 spect to terms or conditions of the said sale, or to the distribution of the proceeds thereof, or in respect to any other matter, as may be just and proper; and jurisdiction in these causes is retained by the court for that purpose, and for the purpose of enforcing all the provisions of this decree.

November 25th, 1901.

Enter this
CLARK
THOMPSON, *Judge.*

And afterwards, to-wit, on the 20th day of February, A. D. 1902, the Master filed his report in the clerk's office of said court, a part of which is clothed in the words and figures following, to-wit:

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, as Trustee, Complainant,
*against*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY and others, Defendants.

THE MERCANTILE TRUST COMPANY OF New York, as Trustee, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING Railroad Company, Defendant.

In Equity. No. 887. Consolidated Cause.

To the honorable judges of said court:

Your Special Master, heretofore appointed under Paragraphs XXXII, XXXIV and XXXVII of the decree entered on the 25th day of November, A. D. 1901, respectfully reports:

254

I.

*As to a certain eight hundred prior lien bonds.*

Regarding the order of reference contained in Paragraph XXXII of the decree, directing the Special Master to inquire into and report upon any claims against certain 800 Prior Lien bonds and against the script therefor, I would respectfully report that the notice by publication therein required has been duly given, but a hearing has not been had upon said claims.

*Special lien of Theodore Leonard.*

Regarding the separate claim of Theodore Leonard, referred in Paragraph XXXIV of the decree, I would respectfully report, that Mr. Leonard, when called by me, stated that his claim of a special lien upon certain funds in the Receiver's hands was finally disposed of by this court upon my former report to your Honors relating exclusively to said Theodore Leonard's claim.

*Diversion of earnings and restoration.*

The order of reference relating to Diversion and Restoration (Paragraph XXXVII of the decree) directs the Special Master" " to take proof and report to this court the amount of

Diversion, if any, of the Current Earnings of the Railroad Company for the benefit of the Prior Lien and General Mortgage bondholders within a period commencing six months prior to the time when claims heretofore in this paragraph mentioned were incurred; and the amounts of the funds during the same period of time derived by the Railroad Company from other sources than Current Earnings.

In considering this matter the said Special Master shall be guided in particular by the opinion of the Circuit Court of Appeals in the matter of the appeal herein of Winfield S. Gregg, etc.

The claims referred to are as follows:

W. S. GREGG.

| Date of Claim. | Cr. |
|---|---|
| June, 1897 | $4,709 53 |
| May 12, 1897 | 194 96 |
| May 25, 1897 | 1,000 00 |
| May 25, 1897 | 300 00 |
| May 25, 1897 | 400 00 |
| May 12, 1897 | 200 00 |

255 ADAMS & WESTLAKE CO.

| | |
|---|---|
| March, 1897 | $ 56 31 |
| March, 1897 | 82 00 |
| March, 1897 | 54 84 |
| March, 1897 | 14 34 |
| March, 1897 | 15 04 |
| April, 1897 | 4 20 |
| April, 1897 | 17 76 |
| April, 1897 | 28 30 |
| May, 1897 | 10 56 |
| May, 1897 | 25 00 |
| May, 1897 | 9 21 |
| May, 1897 | 8 88 |
| | $ 327 44 |
| April 12, 1897 | $ 97 09 |

WM. HARLAN & SON'S.

| | |
|---|---|
| May, 1897 | $ 110 59 |

HANN & ADAIR.

| | | |
|---|---|---|
| April, 1897 | | $ 2 45 |
| April, 1897 | | 85 25 |
| May, 1897 | | 40 00 |
| May, 1897 | | 356 42 |
| | | $ 484 12 |

NATIONAL TUBE WORKS.

| | | |
|---|---|---|
| Feb., 1897 | | $ 102 32 |
| Feb., 1897 | | 153 48 |
| March, 1897 | | 42 00 |
| | | 43 05 |
| | | $ 340 85 |
| May, 1897 | | 230 38 |
| May, 1897 | | 118 90 |
| May, 1897 | | 49 66 |
| May, 1897 | | 64 46 |
| May, 1897 | | 6 18 |
| May, 1897 | | 8 50 |
| May, 1897 | | 2 28 |
| May, 1897 | | 3 28 |
| May, 1897 | | 60 |
| May, 1897 | | 62 |
| Pittsburg Forge and Iron Co. | $1 92 | $ 827 40 |
| May, 1897 | | $ 206 96 |

HARMON & ROBINSON, RECEIVERS OF THE B. & O. S. W.

| Date of Claim. | | DR. | CR. |
|---|---|---|---|
| | April, 1897 | $18 62 | $2,269 42 |
| 256 | May, 1897 | | 3,209 42 |
| | May, 1897 | | 1,603 32 |
| May, 1897 | | | 303 60 |
| May, 1897 | | | 251 45 |
| May, 1897 | | | 143 00 |
| May, 1897 | | | 115 53 |
| May, 1897 | | | 18 49 |
| May, 1897 | | 39 62 | 5 62 |
| May, 1897 | | | 9 04 |
| May, 1897 | | | 8 64 |
| May, 1897 | | | 40 |
| May, 1897 | | | 1 80 |
| | | $58 24 | $7,939 86 |

LOUISVILLE & NASHVILLE R. R. CO.

| | | |
|---|---|---|
| April, 1897 | | $ 140 26 |
| May, 1897 | | 186 53 |
| May, 1897 | | 85 80 |
| May, 1897 | | 82 56 |
| May, 1897 | | 50 14 |
| May, 1897 | | 75 40 |
| May, 1897 | | 33 80 |
| May, 1897 | | 10 40 |
| May, 1897 | | 15 60 |
| May, 1897 | | 18 20 |
| May, 1897 | | 10 15 |
| | | $ 708 84 |

INDIANA, DECATUR & WESTERN RY.

| | | |
|---|---|---|
| Jan. 1897 | $1 92 | $ 19 70 |
| Feb., 1897 | | 20 78 |
| March, 1897 | | 122 44 |
| April, 1897 | | 179 62 |

E. E. SHEDD & SONS.

| | |
|---|---|
| Feb., 1897 | $ 9 00 |
| March, 1897 | 6 00 |
| April, 1897 | 13 00 |
| May, 1897 | 6 75 |
| | $ 34 75 |

STANDARD SCALE SUPPLY CO.

| | |
|---|---|
| April, 1897 | $ 29 29 |

U. S. BRONZE CO.

| Date of Claim | Cr. |
|---|---|
| March, 1897 | $ 22 59 |
| April, 1897 | 44 60 |
| April 12, 1897 | 269 40 |

N. & G. TAYLOR CO.

| | | |
|---|---|---|
| 257 | April 17, 1897 | $ 114 00 |

CIN., HAMILTON & DAYTON RY.

| | | |
|---|---|---|
| Jan., 1897 | $ 21 58 | |
| Feb., 1897 | 34 56 | $ 890 02 |
| March, 1897 | 42 42 | 1,461 54 |
| April, 1897 | 45 82 | 2,359 92 |
| May, 1897 | 40 62 | 976 94 |
| May, 1897 | | 3,461 94 |
| May, 1897 | | 1,814 80 |
| May, 1897 | | 680 48 |
| May, 1897 | | 287 58 |
| May, 1897 | | 166 86 |
| May, 1897 | | 88 58 |
| May, 1897 | | 68 94 |
| May, 1897 | | 56 46 |
| May, 1897 | | 41 82 |
| May, 1897 | | 31 54 |
| May, 1897 | | 19 52 |
| | $185 00 | $12,406 94 |

MERCHANT & CO.

| | |
|---|---|
| Feb., 1897 | $ 15 00 |
| May, 1897 | 57 |
| May, 1897 | 3 92 |
| May, 1897 | 11 31 |
| May, 1897 | 13 95 |
| May, 1897 | 100 00 |
| | $3,208 52 |

MRS. S. M. KINSEY, EXECUTRIX.

| | |
|---|---|
| May 28, 1897 | $1,024 17 |

CHAS. SCOTT SPRING CO.

| | |
|---|---|
| Jan., 1897 | $ 37 13 |
| Jan., 1897 | 38 79 |
| Jan., 1897 | 29 29 |
| Feb., 1897 | 13 41 |
| March, 1897 | 54 83 |
| April, 1897 | 53 84 |
| April, 1897 | 41 97 |
| May, 1897 | 25 30 |
| May, 1897 | 57 48 |
| | $ 352 04 |

E. A. KINSEY & CO.

| | | |
|---|---|---|
| May, 1897 | | $ 18 00 |
| May, 1897 | | 4 32 |
| May, 1897 | | 22 72 |
| May, 1897 | | 6 77 |
| 258 May, 1897 | | 22 27 |
| May, 1897 | | 60 00 |
| May, 1897 | | 61 20 |
| May, 1897 | | 61 20 |
| May, 1897 | | 310 00 |
| May, 1897 | | 26 85 |
| May, 1897 | | 72 00 |
| May, 1897 | | 26 56 |
| May, 1897 | | 18 43 |
| May, 1897 | | 53 80 |
| May, 1897 | | 72 00 |
| May, 1897 | | 325 20 |
| May, 1897 | | 19 87 |
| May, 1897 | | 27 46 |
| May, 1897 | | 43 13 |
| May, 1897 | | 3 50 |
| May, 1897 | | 44 51 |
| May, 1897 | | 1,778 98 |
| May 28, 1897 | | 1,024 18 |
| May 28, 1897 | | 1,024 18 |
| May 28, 1897 | | 1,024 18 |
| | | $4,096 71 |
| March 9, 1897 | | $ 251 32 |
| March 7, 1897 | | 550 00 |
| | | $ 801 32 |

If taken literally, there would appear to be some confusion between the law as declared by the Circuit Court of Appeals, by which I am directed to be guided—which is to the effect that the creditor can concern himself about Divisions of the Current Earnings after the creation of the debt only—and the order, which directs that the inquiry extend back to "a period commencing six months prior to the time when claims were incurred."

But that the Master is to extend the inquiry back such six months—for good measure, or at least for the court's information—is clear from the following remarks by His Honor, Judge Clark, made when approving the decree.

"In regard to the subject of a diversion of earnings such as may be made the basis of a preferential claim, it must be kept in mind that the terms in which this doctrine has been stated in all of the cases have been substantially to the effect that when current earnings which ought to have been applied to the payment of current claims have been diverted to other pur-
259 poses, resulting in advantage to the permanent value of the property, or otherwise to the interest of the bondholders, the lien may be displaced to the extent of such diversion, in favor of a claim which ought to have been or might otherwise have been paid out of the current earnings. It would seem clear enough that a given claim can not in view of this doctrine be given preference on account of a diversion not current in point of time, or substantially so. It would seem quite clear, for example, that a given claim would not be entitled to priority because there may have been a diversion twelve months before the date of the claim, as it could not be said at all that the diversion and the claim were concurrent in point of time. While this is so it is probably true that the dividing line can not be drawn upon a day or a few days, and that a given claim would not be deprived of the right of preference because five days before a large diversion of earnings had been made which would probably have been in the treasury of the company ready to meet the claim except for the diversion. In other words, the doctrine is one which should be enforced in a reasonable way and within reasonable limits.

I have concluded to allow the inquiry as to a diversion of earnings to extend back a period of six months before the date of the claims in favor of which priority is asserted. I am very certain there is no need whatever for going further back, and this inquiry must be conducted strictly on the condition that if the claimants who now ask to open the case in that respect failed to show a diversion of earnings, or if such a diversion is shown and it is held that as a matter of law it is too far back in time to give the claim priority, the claimant or claimants must in either view pay the costs and expenses of a reference in that regard.

As a diversion must, as matter of law, have been for the benefit of the prior lien or mortgage bondholders by increasing the value of his security, it would be necessary for the evidence to show such a state of facts in order either that the Master or this court might find that there had been such a diversion as would give the claim a preference."

Accordingly, there is to be taken into account here not merely any diversion actually concurrent in point of time with the claims which have been re-referred, but also, as being substantially concurrent—or at least for the court's information—any

diversions occurring within a period commencing six months prior to the time said claims were incurred.

260 While the opinion of the Circuit Court of Appeals, in the matter of the appeal of Winfield S. Gregg—by which opinion the Special Master is directed to "be guided in particular"—recommends the claims re-referred as "highly meritorious," it nevertheless negatives permission to follow the practice in some other jurisdictions and regard such claims with preferential favor upon the grounds of public policy, public necessity, or the like. There must be first shown a diversion of earnings, concurrent, or substantially so, with the claims and not "restored," in order to give the "six months" claims a preference over or displace *pro tanto* the prior, recorded contract liens of the mortgage bondholders.

The difference between counsel for the claimants, on the one hand, and counsel for the mortgages and mortgage bondholders, on the other, are of a legal rather than of a mathematical nature.

Counsel differ vitally only as to the definitions of "Diversion" and "restoration," *i. e.*, as to the meaning and scope of these terms depends the solution of the controversy.

No material exception is taken by the opposing counsel to the analytical method of treating the claims adopted by counsel for claimants In fact, a striking analytical method of treating the claims adopted by counsel for claimants.

In fact, a strictly analytical treatment of the claims re-referred requires the taking up of each item separately, considering the period between the date when each item was furnished —and six months prior thereto—and the present time, and the making of a corresponding number of independent investigations and findings.

As a matter of law, it is understood that the inquiry as to diversion does not stop with the appointment of a Receiver. (See the opinion of Lurton, J., in Gregg *v.* Mercantile Trust Co., 109 Fed. Rep. 227 and cases), although it seems to have been assumed by counsel that it does. The order of reference also does not limit the period of inquiry to the commencement of the Receivership.

There is, however, as I understand, no charge here of diversion during receivership.

But as being safely within the concessions of both sides, the Special Master has treated the questions of time and dates under two comprehensive heads, to-wit:

1. The Period of Current Diversions.
2. The Period of "Substantially" Concurrent Diversion.

261 *The period of concurrent diversion.*

All of the items of these "six months' " claim- were incurred within the period commencing December 1st, 1896, and ending June 1st, 1897, at which last date a receiver was appointed.

The oldest item of any of the claims was incurred not earlier than January 1st, 1897. A diversion occurring during said period, from December 1st, 1896, down to the present date, would therefore be approximately concurrent with any item of the claims. I designate this space of time, commencing December 1, 1896, "The Six Months' Period".

*The period of substantially concurrent diversion.*

This construed in the light of the order of reference means, in this case, "a period commencing six months prior to the time when the claims were incurred." Or if not necessarily so in the eye of the court, it comes to that of the Special Master, as he must, under the order, extend the investigation back that far. The oldest item of the claims being not earlier than January 1st, 1897, therefore a period of time commencing one year before the receivership, to-wit. Commencing June 1st, 1896, would extend back to date which is not less than six months prior to the date of any item of the claims.

I designate this space of time, commencing June 1st, 1896, "The Twelve Months' Period."

A diversion occurring during said last-named period from June 1st, 1896, down to the present time, would be "Substantially" concurrent with any items of the claims.

This would start the inquiry as to each item at a no less early date than counsel for claimants have taken for themselves (see their brief of tables), and at dates, too, which, for the purposes of the case at least, are not demurred to by the opposite counsel.

The burden lies upon the claimants of proving diversion, and also as I understand, of proving non-restoration. (Central Trust Company v. East Tenn., V. & G. R. Co., 80 Fed. Rep., 624-626.)

"The burden is upon claimants to show that there has been a misappropriation of earnings to the improvement of the mortgaged property, or to the payment of interest, before the mortgagee can be justly called upon to reimburse the fund applicable to debts of the income in consequence of such diversion. If interest was paid or improvement made out of
borrowed money, then there was no diversion; or, if
262 made out of gross earnings, and the latter was reimbursed by borrowed money, the diversion was made good."

In order to sustain this burden of proof the claimants must show:

Expenditures upon the property of the Railroad Company, or interest paid which have correspondingly enhanced the security of the bondholders or benefited them. That such expenditures were made or interest was paid from current earnings applicable to the payment of current debts, or "debts of the income", as the Court of Appeals has expressed it, and not from any money derived from other sources. Or, if paid originally from current earnings, that such earnings were not "made good" by funds derived from such other sources. (80 Fed. Rep. 626; 109 Fed. Reporter, 229.)

Examine first the figures from December 1st, 1896.

During that, "Six Months' Period" of time, taking the figures of Mr. McGowan, the experts for claimants, expenditures made by the railroad company which, under the decisions enhanced the security of the bondholders or benefited them, were as follows (see the exhibits attached to testimony before me):

| | |
|---|---|
| Payments upon car trusts | $88,208.31 |
| Sidings | 3,045.45 |
| Land purchased | 2,257.20 |
| Interest on mortgage bonds | 5,504.53 |
| Total | $99,215.49 |

The "interest on mortgage bonds" was as follows:

| | |
|---|---|
| Interest on prior lien mortgage script | $1,562.08 |
| Interest on prior lien mortgage bonds | 2,079.95 |
| Interest on general mortgage bonds | 537.50 |
| Interest on "Short Line" bonds | 1,325.00 |
| Total | $5,504.53 |

The "benefit" of some of this to the bondholders may be doubtful, but I do not find it essential to analyze this bond interest, but hold it all as a diversion.

In addition, the following expenditures were made during this period:

| | | |
|---|---|---|
| | For car couplers | $ 6,517.78 |
| | Interest on Monsarrat receiver certificates | 21,291.66 |
| 263 | On Union Depot viaduct | 442.44 |
| | On coupon notes | 8,400.00 |
| | | $36,651.88 |
| | Which added to the former total of | 99,215.49 |

(Assuming that these last items are all ("Diversions") would make a grand total of possible gross diversions during the "six months period" of ..... $135,867.37

Counsel for the claims make this total of gross diversions during the same six months period, $136830.50.

The difference is in their item of "Permanent Improvements."

However, taking counsel's said total of gross diversions, for the present, that account, for the "six months" period would stand thus:

| | |
|---|---|
| Car trusts ..... | $88,208.31 |
| Permanent improvements ..... | 13,426.00 |
| Interest on bonds ..... | 5,504.53 |
| Receiver's certificate interest ..... | 21,291.66 |
| Coupon notes ..... | 8,400.00 |
| Total ..... | $136,830.50 |

See brief of counsel for claimants at Exhibit "D" attached thereto.

Query, as to the several of said items, claimed to constitute "diversions."

1. Were the car couplers additions to the permanent equipment of the road, in the sense meant by the decisions, or a maintenance charge?

The cost of car couplers would seem to be properly payable from current income, and such payment not diversory, according to the principles laid down in Rhode Island Locomotive Works *vs.* Continental Fruit Company—unless a legal necessity for new couplers lends a different color to the question, which last in the absence of authorities to that effect, I am unable to hold. Not every addition, even if more or less permanent, is held to be for the benefit in a diversory sense of the bondholders. The new couplers, if of improved pattern, but replaced old couplers.

2. As to "Coupon Notes, $8,400". These were the notes mentioned in my former report to your Honors, filed in September, 1899 (see printed Record, p. 347), being an issue of $89,000.00 of notes, commonly called the "Columbus,
264 Shawnee and Hocking Coupon Notes." These notes were not secured by any mortgage, and while they were assumed by the present Railroad Company, to be paid in manner as provided in the reorganization agreement of June 11,

1895 (Record, p-. 159, 160), they have been held in this cause to be without lien of any kind for their security, upon any of the railroad property. I am unable to see how the payment of this indebtedness, or interest on the same, could enhance the value of security of the bondholders, or could be for their benefit, in the sense of the decisions; though the payment may have prejudiced the six months' claim.

3. The interest on Monsarrat Receiver certificates, (whatever the correct amount) in view of what has been decided in this cause both by this court and the Court of Appeals, would seem to have been a "voluntary" payment on the Railroad Company's part. I do not understand that the company was liable for the Monsarrat certificates. The Railroad Company had assumed the "floating debt" of the Old Railway Company "whatever the same might be at the date of the transfer of said property." (Record, p. 159.)

The Monsarrat Receiver Certificates were not a debt of the old Railway Company. (See forms of same, Record pp. 563, 564.)

But said certificates, at all events, were and are not a lien upon any of the present railroad property. (See the decision by this court and the Court of Appeals in this cause.)

It can not be seen, therefore, how their payment or the payment of interest upon them could in any way inure to the benefit of the bondholders, nor to the benefit of any one but the holders of the certificates, though, as in the case of the coupon notes, the payment was in a sense prejudicial to the six months claims.

If these certificates and the coupons notes were not paid, in whole or in part, they would not stand and could not stand in the way of the bondholders' lien. To pay them off in whole or in part no way releases or enhances the value of the mortgaged property, in no way benefits the mortgage bondholders.

4. Did payments upon the Union Depot Viaduct account enchance the security, or benefit the bondholders, though their mortgage does not appear to cover the depot property, nor anything connected therewith?

It is claimed that the operating position of the Railroad Company is bettered by such payment and that the bondholders, under this foreclosure "will receive as a part
265 of the purchase price covered by their lien, this lease with the rights that appurtain thereto." I am unable to vitally distinguish from other perpetual leases, nor to say that it is covered by the mortgage of the bondholders, in the sense claimed by counsel for claimants.

Opposed to the foregoing expenditures, if they were all divisions in favor of the bondholders, and taking the claimants aggregate of .....$136,830.50.

There were received from sources other than current earnings, during said "six months period," the following:

| | |
|---|---|
| Money borrowed | $127,781.25 |
| Money collected through a sale of mileage books, on account of other railroads and not accounted for to them | 98,712.54 |
| Old earnings collected (not current) | 2,148.47 |
| Total "other" money | $228,642.26 |

In delivering the opinion of the court upon this branch of this cause, His Honor, Judge Lurton, said that if "money was received from the sale of the bonds and from other sources than current earnings, which more than made good any income applied to car trust obligations the appellants can not complain."

The item $96,712.54 from the sale of mileage books, is strenuously objected to by counsel for claimants. It is contended that it is not money received from a source other than current earnings.

Do the proceeds of the sale of these "mileage books," amounting to $98,712.54 (shown on Merion Exhibit "B"), represent a source of income other than current earning-? The transaction was perhaps unusual. If so, that fact would rather add to than subtract from the evidence that they do not represent earnings. There would appear to be good ground for holding that such proceeds were other than earnings.

This money was never treated as current earnings by the accountants of the company. It was carried in a suspense account. (Testimony of Merion Auditor.)

The mileage books were sold at a discount (about $16.00 per book; price about $20.00). The transaction, apparently, amounted to the borrowing of that much money by the Railroad Company on the security of the mileage books—the money to be repaid in the future in the services of the C., S. & H. Railroad Company by the carrying of passengers, or in similar services of other railroad companies who were to be reimbursed by the C., S. & H. Railroad Company for
266 such services. Could a sale of bonds to raise money be distinguished, in principle, from such sale of mileage books—made in quantities to brokers and at such discounts as to preclude any probability that the transaction was a mere selling of tickets in the usual course of business? It appears to have been res*tor*ed to as a means of raising money, on the general credit of the Railroad Company after all ordinary means of doing so had been practically exhausted.

The mileage books were promises to render services on presentation and sold as they were, in the way they were, in bulk and on the faith of the general credit of the Railroad Company, and it appears as to this amount not accounted for, the proceeds seem distinguishable from earnings.

Objection is taken also to such items as "old earnings collected not current, $2,148.47."

But leaving both of these last mentioned items out of the funds received from other sources, there is left in the "six months period."

Borrowed money ..... $127,781.25

It is not to be forgotten that the only true diversions of earnings, in favor of the mortgage bondholders, during the "six months period", were:

| | |
|---|---|
| Car trusts | $88,208.31 |
| Sidings | 3,045.20 |
| Land | 2,457.20 |
| Interest on mortgage bonds | 5,504.53 |
| Total diversion of current earnings during "six months period," for bondholders' benefit | $99,215.49 |

Against which there was, during said period, received from other sources than current earnings (mileage books and old earnings subtracted):

Said borrowed money ..... $127,781.25

If there be counted as diversions, said:

| | |
|---|---|
| Car couplers | $ 6,517.78 |
| Union Dept. viaduct account | 442.44 |
| And the same to be added to said | 99,215.49 |
| Said total diversion will be | $106,175.71 |

267 Against which there is:

Said borrowed money ..... $127,781.25

Up to this point in examining the "six months period," the Special Master has avoided calling the above named funds derived from sources other than current earnings, "restoration" funds, for concerning that there is contention.

He has avoided also both the assumption that they were so applied as to offset or make good the diversions, and the assumption that the question as to how the said funds other than current earnings were applied is relevant to the question of restoration or reimbursement; for over these last mentioned questions, too, there is contention.

Whether or not said funds derived from other sources constitute or are proper subjects of "restoration," and also whether or not they were so applied as to "make good" the diversion; further, whether this last mentioned question is material are inquiries which arise again in the "twelve months period." They are fully considered hereinafter. Assuming just now, to save repetition, that such funds are proper subjects of "restoration" and that the question as to how they were applied is material to the question of "restoration."

Mr. Merion's figures show that said "other" money was paid as follows:

| | |
|---|---|
| On pay rolls | $70,370.17 |
| On car trusts | 22,629.83 |
| On miscellaneous vouchers | 33,569.44 |
| As to the amount received from sale of mileage books, it was mingled with the general funds of the company and was used for general purposes, chiefly current expenses (Merion testimony) | 98,712.54 |
| Total of payments | $225,281.98 |

| | |
|---|---|
| Against a total gross diversion for the "six months period" (as claimed on behalf of claimants) of | $136,830.50 |
| Leaving out said $98,712.54, received from mileage books, said payments total will be | 126,569.44 |

The only true diversions during said "six months period" in favor of bondholders being the said:

| | | |
|---|---|---|
| 268 | Payments of car trusts | $88,208.31 |
| | Payments on sidings | 3,045.45 |
| | Payments on land | 2,457.20 |
| | Payments on interest on bonds | 5,504.53 |
| | Total | $99,215.49 |

| | |
|---|---|
| Or with said car couples, $6,517.78, and Union Depot viaduct acc't, $442.44 added | $106,175.71 |

*Twelve months period.*

Examining now the "Twelve Months Period" from June 1st, 1896, the possible gross diversion side of the account appears to the Special Master to stand as follows:

| | |
|---|---|
| Car Trusts (McGowan) | $177,663.55 |
| Land (McGowan) | 2,757.20 |
| Sidings (McGowan) | 5,655.35 |
| Car Couplers (McGowan) | 6,605.54 |
| Interest on Bonds (McGowan) | 10,777.14 |
| Int. on Monsarrat Cfts. | 34,791.66 |
| Union Depot Viaduct (Merion) | 1,621.72 |
| Coupon Notes (McGowan) | 17,370.00 |
| Total | $257,252.16 |

Counsel for claimants make the aggregate amount of possible gross diversion in the "Twelve Months Period" about the same —(somewhat larger) and the said account to stand thus:

| | |
|---|---|
| Car Trusts | $177,633.55 |
| Permanent Improvements | 17,741.29 |
| Interest on Bonds | 10,777.14 |
| Receivers Certificates | 34,791.66 |
| Coupon Notes | 17,370.00 |
| Total | $258,343.64 |

See Exhibit "D" attached to brief of claimants.

I adopt this last mentioned aggregate or total of counsel as the possible gross diversion in the twelve months period, viz.: $258,343.64.

Against this there was received, during said twelve months period, from other sources than current earnings, according to the statement of Mr. Merion, (see Merion's Exhibit "A" and his testimony):

| | | |
|---|---|---|
| 269 | Borrowed money from H. W. Putnam | $ 50,000.00 |
| | From sale 5 1st Mortgage Bonds | 5,000.00 |
| | From sale 7 1st Mortgage Bonds | 7,000.00 |
| | Money acquired from loans as per Merion Exhibit "B" | 248,493.79 |
| | Total "Other" Money | $310,493.79 |

But as to some of said items there must be noted similar objections to those which were noted in the "Six Months' Period" to-wit: As to car couplers $6,605.54, depot viaduct account $1,621.72, interest Monsarrat certificates $34,791.66, and coupon notes $17,370.00.

These items do not appear to the Master to be diversions, in the sense of the decisions, for reasons hereinbefore stated.

The true diversions in the "Twelve Months' Period" *i. e.* which enhanced the mortgaged property, or otherwise were for the bondholders' benefit, are the following:

| | |
|---|---|
| Car Trusts | $177,663.55 |
| Land | 2,757.20 |
| Sidings | 5,665.35 |
| Interest on Bonds | 10,777.14 |
| Total | $196,863.24 |

It seems certain that the payments on Monsarrat certificates and payments on coupon notes were not diversions.

It is reasonably certain that the car coupler and viaduct payments were not.

But if these last two items be diversions, then the diversion account will stand, for the "Twelve Months' Period:"

| | |
|---|---|
| Car Trusts | $177,663.55 |
| Land | 2,757.20 |
| Sidings | 5,665.35 |
| Interest on Bonds | 10,777.14 |
| Viaduct | 1,621.72 |
| Car Couplers | 6,605.54 |
| | $205,090.50 |

Against which there stands said money derived from sources other than current earnings as reported by Mr. Merion, $310,493.75.

270 In this $310,493.75 there are no old earnings not current.

| | |
|---|---|
| If from said | $310,493.75 |
| there be subtracted the amount received from said mileage books | 98,712.54 |
| there will remain of unexceptionable funds from sources other than earnings | 211,781.21 |

Upon that concession the account would stand:

Total true diversion of current earnings in the "Twelve Months' Period" ..... $205,090.50
Total funds received from sources other than current earnings during the same period ..... $211,781.21

Nothing has been said up to this point in the "Twelve Months' Period" as to whether all of said funds received from sources other than current earnings constitute "restoration" funds; nor whether they were so "applied" as to make good the diversions, nor whether said question of application is material or relevant to the question of restoration.

The result from and under all of the foregoing comparisons and concessions appear to make it evident that if the said receipts other than current earnings in all respects constitute a legal reimbursement of the gross earnings, the conclusion must be that the diversion was made good.

But that such receipts from other sources do or did constitute a full reimbursement of or restoration to the gross earnings or made good the diversion, is emphatically denied on behalf of the claimants.

On their behalf it is contended that there was no reimbursement of or restoration to the gross earnings beyond the sum of $38,060.37 for the "Six Months' Period," nor beyond the sum of $100,060.39 for the "Twelve Months' Period."

Upon first consideration your Special Master had concluded that your honors had not by the order or reference placed upon his the duty of examining or considering these last mentioned questions, which are rather questions of law than of fact.

But counsel for both sides have taken a different view and have fully argued said questions by briefs and submitted the same for a finding.

Lest he should evade any part of his duty, your Special Master attempts an examination of the said questions.

271

It is concluded to be clear from the decisions that in case of alleged diversion of current earnings for the benefit of bondholders, during a given period, the lien of the latter will not be displaced if it appears either that—

(*a*) The interest was paid on improvements were made out of borrowed money and not in fact out of gross earnings, for in this case "there was no diversion;" or—

(*b*) In case the same were paid or made out of gross earnings, if the latter were reimbursed within the period by borrowed money, for in this case the diversion was "made good."

Central Trust Co. *vs.* East Tenn., V. & G. R. Co., 80 Fed. Rep. 624-626, *supra.*

"Borrowed money" is understood to include all funds derived from sources other than current earnings.

While this is clear the following question has been raised in this instance.

Give the proven diversion within the specified period.

Admitted that the latter may reimburse the earnings and make good the diversion.

In what way or ways may or must the reimbursement be accomplished, so as to make good such diversion?

No case has been cited and the Master has found none exactly answering this question, but it would not, upon principal, seem to be quite so complicated a question as has been assumed in argument.

It cannot be going far wrong to fix definitely what is sought.

We seek the way or ways in which the "gross earnings" may or must be reimbursed and the diversion of current earnings made good thereto, but not necessarily how the owners of debts of the income are to be reimbursed, or paid their claims.

Counsel for claimants discuss the question at length in their brief; but, some question begging* out of the way, the argument appears to prove no more than this—That if the payments which are claimed to constitute the diversion, were in fact made out of "borrowed money" in the first instance, or if it cannot be told but what they were, then there was no diversion.

272 A proposition which might be admitted without argument, since the decision above referred to states the same more clearly when it says: "If interest was paid or improvements made out of borrowed money, then there was no diversion."

We have some items here which admittedly come under that head. But more items do not, but are claimed to fall within the class covered by the next clause of the said opinion, to-wit: "If made out of gross earnings and the latter was reimbursed by borrowed money, the diversion was made good.

The question is merely, do such items or did they reimburse the gross earnings and make good the diversion in whole or in part?

The situation described in the first clause of the quotation from the opinion and by counsel for claimants in their brief, needs no "restoration," for there nothing was ever in fact, or at least not discernibly lost or diverted from the gross earnings.

---

*A diversion could not be "shown" under the state of facts assumed in the leading proposition of claimants' argument, (Brief p-. 8, 9) nor could it be made to appear that earnings had been "used" for the benefit of bondholders—under the conditions stated in their "theory of restoration" (*Id.*)

Counsel's contention, to the effect that only diversory payments can be counted as restorative payments, is true so long as the word "restoration" is used, as a legal fiction. In that sense it is used throughout their argument; but in the deductions, nevertheless there is a substitution of definitions and restoration is now used in a new sense, to-wit: its real sense—the bringing back of that which was in fact lost. Their proposition now becomes not true—when restoration is used in this last, *the actual sense*.

To restore earnings which have been in fact lost, it is not necessary that the restorative payments should be also diversory payments. In this unconscious substituting of definitions of the word "restoration," if I mistake not, lies the seeming logic as well as the fallacy of the argument. The question, how shall we restore that which - in fact lost? is left unanswered by it.

Proceeding, the following (quotation from the brief, p. 9) is propounded as an answer—possibly as the only answer to our question:

"In the presence of proof that money from sources other than earnings was not so used to make payments which inured to the benefit of the bondholders, it is immaterial that such money came into the treasury and was used to make payment of other claims, whatever might be their nature."

Separate from the context, I believe this would not be far from the truth.

But "immaterial," I understand, because of what
273 counsel contend on page 8 brief, "That only such funds which were acquired from sources other than current earnings as were in fact or might have been applied to the payments which inured to the benefit of the bondholders and make up the diversion, can be considered upon the question of the amount of the restoration."

The contention being evidently, as noted above, that there can be no restorative payments which are not also diversory payments; in fact that they may coincide, the restoration being the diversion and the diversion the restoration. Otherwise no sort of reimbursement is open to the bondholders. It must, in short, be disproved, or fail to appear, that there was diversion in fact; else there is no help for the bondholders. But as above intimated this is merely flying in the face of the second clause of the decision above quoted, which is more liberal and allows the bondholders, under a plea as it were of not guilty of diversion, to also cite matters resembling confession and avoidance. It says: "If interest was paid or improvements were made out of gross earnings, and the latter was reimbursed by borrowed money, the diversion was made good."

All of which leaves the mooted question how to reimburse and how to make good still unanswered.

Passing on in said brief there is found an illustration containing within it an implied contention that the money derived from other sources must in fact reach the owners of the debts of the income in order to accomplish a reimbursement, and that if "stolen from the company's safe" after receipt by the last named, such money could not be counted as a restoration. This is plainly the contention although, strangely enough, shortly after it is claimed that it was not a legal restoration, though "borrowed money" did in fact reach the hands of the owners of pay roll accounts, which were "debts of the income", of the same class as those re-referred in this case.

The reason given for this last (apparently) is that the borrowed money should have been used for the benefit of the bondholders instead of for the owners of the debts of the income, and if it had been used for the bondholders, then there would have been a true "restoration."

But dropping this last, in the illustration as to the theft of the borrowed money after it reaches the company's safe, and in the contention that "the debts of the income were not helped because somebody else had been paid his claim" (brief p. 9), the question is exactly faced—*it is* material to the question of reimbursement of the "gross earnings" how the money is applied or that it is subsequently stolen, if once it
274 reach the company's hands? Is it not the diversion, nevertheless, "made good", though the money be subsequently misapplied or stolen?

The diversion is not from the bank accounts of the owners of the debts of the income; neither, it would seem, need the restoration be to such bank accounts, nor to any accounts. The restoration is to the gross earnings whence flowed the diverted current earnings.

The Railroad Company is the legal authorized guardian to receive the reimbursing "borrowed money", as it also had been the current earnings prior to diversion. The bondholders were under no duty before the diversion to see that the current earnings were applied to debts of the income, nor to any particular debts payable out of the treasury; nor to guard the treasury lest the current earnings should be stolen or embezzled. No more, it would seem, can they be held to a similar duty as to the restored earnings—the reimbursing "borrowed money."

The owners of the debts of the income are entitled, as against the bondholders, to be put in as good a position with respect to the current earnings as they held before the diver-

sion but not in a better. They have been restored to their former position when the reimbursing "borrowed money" had reached the earnings treasury, to wit: the hands of the Railroad Company. The holding of the bondholders to the duty of seeing that borrowed money is not itself diverted to purposes other than payment of debts of the income, is a kind or degree of restoration of diversion which the courts have not recognized, and, upon principle, would not recognize, unless, indeed, such last "diversion" were also, and again for the bondholders' benefit.

In order that his possible error of law may be the more conspicuous to your Honors and so the more quickly corrected, the Special Master sums up the conception of the law under which he has reported hereinabove thus:

If current earnings have been misapplied to the enhancement of the security of the bondholders, the gross earnings are "reimbursed" and the diversion "made good" if there is subsequently or contemporaneously paid into the treasury of the company, a sum of money, derived from sources other than current earnings, equal to the amount of current earnings diverted, to which owners of current debts of the income may look for payment, and which is available for the pay-
275 ments of their debts. And there the liability of the bondholders to give way to the debts of the income ceases.

It is immaterial upon what character of claims such funds from sources other than current earnings may subsequently be paid out, if once they have been covered into the treasury of the company. The "gross earnings" having been thus "reimbursed" and the diversion thus "made good," the event that the company should subsequently neglect to apply the "borrowed money" to the retirement of the current operating expenses, or, the fact, that the same was subsequently stolen from the company, would not deprive the bondholders of the benefit of the anterior fact that restoration had been made.

Of course, *a fortiori* has restoration been *pro tanto* made, in fact as well as in law, if current debts of the income—such as pay roll accounts, or the claims of W. S. Gregg, E. A. Kinsey Company, Adams and Westlake Company, etc., are paid with the money derived from other sources, alt-ough counsel for claimants have strangely contended that this last constitutes neither restoration in law nor in fact.

But assuming that the question of application is material, what are the uses to which the evidence shows the funds derived from sources other than current earnings were put in this instance?

On Mr. Merion's written statement of amounts received from

sources other than current-earnings during the "twelve months" period, there also appear the uses to which such money was put. (Merion's Exhibit "A, etc.," see also his testimony.)

Such receipts from sources other than current earnings were used by the Railroad Company in four distinct ways:

First. Some were used as pay car trust obligations.

Second. Some went into the common treasury, were mingled with other funds and used with them indiscriminately.

Third. Some were used to pay pay-roll debts and other current debts which were debts of the income.

Fourth. Some were used to pay other unsecured debts of the company which were not debts of the income.

As to the first use there can be and is no dispute. It comes under this clause of the foregoing decision: "If interest was paid or improvements made out of borrowed money, then there was no diversion."

As to the second use, there is also no dispute. It is a
276 similar situation to that described in 80 Federal Rep. 624, 626.

"But it is also shown that, during the same period money was borrowed on open account, more than sufficient to equal the diversion complained of, which went into a common treasury from which operating expenses, preferential claims, interest and improvements were paid, without any definite showing as to whether the borrowed money was applied to the payment of interest and improvements, or to the current income debts * * * Whatever diversion there may have been of income to payment of debts or liabilities, not properly debts of the income, seems to have been more than reimbursed by money borrowed."

As to the third use there is dispute, but it would seem that there ought not to be—unless claimants would contend that payment of their own six months' claims—debts of income—would not constitute a reimbursement of the earnings nor make good *pro tanto* the diversion. In fact, as well as in law, this third use must constitute a reimbursement of gross earnings.

The question raised by the fourth use—if any of this be material—would seem more debatable than the other three. But remembering that the reimbursement to which the bondholders are held is not of the owners of the debts of the income but merely of the gross earnings, the question appears to the Master really not a close one in any event.

When these six months' claimants and other creditors of the income contracted on the faith of the said current income, they could only do so charged with knowledge that they would

not be the owners of the current income; such creditors of the income would not have even the exclusive right to be paid out of such current income—except as against the bondholders. As against general floating indebtedness, pressing claims not preferential, and the like, they would not have such exclusive right.

They can not, actually nor in theory, compel the holders of non-preferential unsecured debts to make good to them what such holders may have received from the gross earnings.

The application to such non-preferential debts was a reimbursement of the earnings-fund, equally with the payment of preferential debts, in the sense that it was for purposes other than the enhancement of the mortgaged property.

The trouble over the item of $750 for commission paid
277 Hatch and Foote, raises a question of accurate accounting.

The result in borrowed money would have been the same had nothing been said about the $750.00 commission item upon either side of the account. There would merely have been an incomplete record of the transaction. No claim as I understand is advanced that this particular item of $750.00, paid as a commission restored any particular item or portion of the diversion. Having appeared in the $40,000 on one side of the account, it appears in the vouchers on the other side and the net result is $39,250.00 of borrowed money by way of reimbursement—the same as if the $750.00 had not appeared on either side of the account.

Nominally the $750.00 is classified as an operating expense.

The evidence from which said facts and figures are gathered is to be found in the following herewith transmitted:

McGowan Exhibits, "1," "2," "3," "4," "5," "6," "7," "1 A," "3 A," "6 A," "7 A," "1 B."

The testimony of Mr. McGowan.

Merion Exhibits "A," "B," etc.

The testimony of Mr. Merion.

Exhibits showing the form of lease and contract with the Union Depot Company, at Columbus, Ohio, and the affidavit thereto.

The record and papers filed in this cause in full.

Respectfully submitted,

HENRY M. BUTLER,
*Special Master.*

And afterwards, to wit, but on the same day the master filed testimony taken before him with exhibits in the clerk's office of said court, parts of which being clothed in the words and figures following, to wit:

McGOWAN EX. 1.

C. S. & H. R. R. Co.

*Payments for old debts of Railway Co. and receiver.*

| | | |
|---|---|---|
| Railway Co. Prior to Dec. 1-96..... | $311,819.46* | |
| Subsequent Dec. 1-96..... | 19,014.42 | $330,833.88 |
| Receiver Prior to Dec. 1-96..... | 88,322.66 | |
| Subsequent Dec. 1-96..... | 480.13 | 88,802.79 |
| | | $419,636.67 |
| 278 Less Receipts: | | |
| Railway Co. Prior to Dec. 1-96..... | 8,710.01 | |
| Subsequent Dec. 1-96..... | 1,371.21 | |
| Receiver Prior to Dec. 1-96..... | 282,603.79 | |
| Subsequent Dec. 1-96..... | 777.26 | $293,462.27 |
| | | $126,174.40 |

| | | |
|---|---|---|
| Prior to Dec. 1-96..... | $108,828.32 | |
| Subseq't Dec. 1-96..... | 17,346.08 | |
| | $126,174.40 | |

*Includes $135,172.82 paid Stearns & Hoover with Bonds.

(9-25-01)

McGOWAN EX. 2.

*Payments for Car Trust Notes and Interest on same.*

| | | |
|---|---|---|
| November, 1895 ..... | $ 3,235.43 | |
| December, 1895 ..... | 36,510.96 | |
| January, 1896 ..... | 18,283.60 | |
| February, 1896 ..... | 14,147.40 | |
| March, 1896 ..... | 22,608.95 | |
| April, 1896 ..... | 14,613.26 | |
| May, 1896 ..... | 15,730.96 | |
| June, 1896 ..... | 15,147.40 | |
| July, 1896 ..... | 18,432.22 | |
| August, 1896 ..... | 15,113.26 | |
| September, 1896 ..... | 13,896.33 | |
| October, 1896 ..... | 13,900.78 | |
| November, 1896 ..... | 12,965.25 | |
| | | $214,585.80 |

| | | |
|---|---|---|
| December, 1896 | 16,887.01 | |
| January, 1897 | 5,282.02 | |
| February, 1897 | 15,564.77 | |
| March, 1897 | 16,129.35 | |
| April, 1897 | 20,130.14 | |
| May, 1897. | 14,214.42 | $ 88,208.31 |
| Total | | $302,794.11 |

(9-25-01)

279 McGowan Ex. 3.

C. S. & H. R. R. Co.

*Payments for permanent improvements, betterments, &c.*

| | | |
|---|---|---|
| Machinery, (Prior to Dec. 1-96) | | $ 7,036.92 |
| Sidings, buildings, &c., Prior | $ 3,386.66 | |
| Subsequent | 3,045.45 | 6,432.11 |
| Equipment (Couplers, &c.) Prior | 1,887.39 | |
| Subsequent | 6,517.78 | 8,405.17 |
| Land purchased, Prior | 300.00 | |
| Subsequent | 2,457.20 | 2,757.20 |
| Union Depot Viaduct, Prior | 7,859.48 | |
| Subsequent | 442.44 | 8,301.92 |
| Total | | $32,933.32 |
| Prior to Dec. 1, 1896 | $20,470.45 | |
| Subsequent to Dec. 1, 1896 | $12,462.87 | |
| | $32,933.32 | |

(9-25-01.)

McGowan Ex. 4.

C., S. & H. R. R. Co.

*Payments for Interest on Bonds, Notes, Etc.*

Interest on Mortgage bonds and scrip.

| | | |
|---|---|---|
| April, 1896 | $3,020.35 | |
| September, 1896 | 2,500.00 | |
| October, 1896 | 2,718.25 | |
| November, 1896 | 54.36 | |
| | | $8,292.96 |

| | | |
|---|---|---|
| December, 1896 | 2,257.46 | |
| January, 1897 | 622.73 | |
| February, 1897 | 39.00 | |
| March, 1897 | 186.22 | |
| April, 1897 | 2,142.39 | |
| May, 1897 | 256.73 | |
| | | $5,504.53 |
| Total | | $13,797.49 |

280 Interest on coupon notes.

| | | |
|---|---|---|
| November, 1895 | $6,000.00 | |
| December, 1895 | 4,440.00 | |
| January, 1896 | 870.00 | |
| February, 1896 | 420.00 | |
| June, 1896 | 8,670.00 | |
| November, 1896 | 300.00 | |
| | | $20,700.00 |
| December, 1896 | 7,950.00 | |
| January, 1897 | 180.00 | |
| February, 1897 | 270.00 | |
| | | 8,400.00 |
| Total | | $29,100.00 |

Interest on Receiver's certificates.

| | | |
|---|---|---|
| January, 1896 | $3,375.00 | |
| July, 1896 | 7,500.00 | |
| September, 1896 | 6,000.00 | |
| | | 16,875.00 |
| December, 1896 | | 21,291.66 |
| Total | | $38,166.66 |
| Prior to Dec. 1st, '96 | $45,867.96 | |
| Subsequent to Dec. 1, '96 | 35,196.19 | |
| | $81,064.15 | |

(9-25-01.)

McGOWAN EX. 5.

*Recapitulation.*

| | Prior to Dec. 1-96 | Subsequent to Dec. 1-96. | Total. |
|---|---|---|---|
| Car Trust Notes ..... | $214,585.80 | $ 88,208.31 | $302,794.11 |
| Debts Ry. Co. & Rec. .... | 108,828.32 | 17,346.08 | 126,174.40 |
| Improvements, &c. .... | 20,470.45 | 12,462.87 | 32,933.32 |
| Int. on Bonds, &c. ..... | 45,867.96 | 35,196.19 | 81,064.15 |
| | $389,752.53 | $153,213.45 | $542,965.98 |

(9-25-01.)

281 McGOWAN EXHIBIT 6.

C., S. & H. R. R. Co.

*Money Acquired by Loans and Sale of Bonds, Dec. 1-96, to May 1-97,*

From Guaranty Trust Co. (Note a 6 mo. from 12-28-96.)

| | | |
|---|---|---|
| Dec. 31-96 Vouchers paid ..... | $27,075.00 | |
| Jan. 9-97. Vouchers paid ..... | 6,494.44 | |
| Jan. 25-97. Draft ..... | 6,000.00 | |
| Mar. 11-97. Draft ..... | 430.56 | |
| | | $40,000.00 |

(56 First M-t-ge Bonds as security.)
From Deshler Nat-l Bank Loan, Feb. 28-97, $25,000.
From Deshler Nat-l Bank Loan, Mar. 31-97, $16,000.

| | | |
|---|---|---|
| Feb. 28, check ..... | $17,000.00 | |
| Mar. 5, check to pay car trust notes .... | 5,019.31 | |
| Mar. 25, check ..... | 2,980.69 | |
| Mar. 31 ..... | 12,170.17 | |
| Ap-l 26, check ..... | 3,829.83 | |
| | | $41,000.00 |

From Hatch & Foote:

| | | |
|---|---|---|
| Dec 22-96, draft ..... | $32,000.00 | |
| Dec. 24, draft ..... | 3,200.00 | |
| Dec. 29, draft ..... | 1,462.34 | |
| Dec. 29, vouchers paid ..... | 9,337.66 | |
| | | $40,000.00 |

(As 100 First M-t-ge Bonds were sent July 31-96 to Hatch & Foote for sale above amount may have been part of proceeds).

From First Mortgage Bond Scrip.

| | |
|---|---|
| Mar. 15-97. Issued to pay voucher, in favor of D. S. Gray (Ry. Debt) ..... | 781.25 |
| Total ..... | $127,781.25 |

(MEMO.) During Sept., -96, $12,000 was received from Hatch & Foote. No other money rec-d from sale of bonds.)

(9-25-01.)

C., S. & H. R. R. Co.

*Earnings, Operating Expenses and Deductions.*

| 1895 | Earnings. | Expenses. | Leased Line Rentals. | Taxes. | General Interest. | Surplus. |
|---|---|---|---|---|---|---|
| Nov. | $40,270.97 | $ 29,874.37 | $ 2,992.71 | $ 859.12 | $ 2,103.99 | $ 4,440.78 |
| Dec. | 65,242.66 | 51,691.60 | 6,584.43 | 1,610.85 | 3,927.22 | 1,428.56 |
| 1896. | | | | | | |
| Jan. | 60,189.79 | 50,475.47 | 6,596.59 | 1,722.75 | 3,778.47 | 2,383.49 |
| Feb. | 62,561.17 | 46,858.50 | 6,597.35 | 1,722.75 | 4,913.85 | 2,468.72 |
| Mar. | 57,464.94 | 50,800.49 | 6,377.10 | 1,722.75 | 9,056.70 | 10,492.10 |
| Ap-l | 52,347.00 | 49,677.08 | 6,663.65 | 1,722.75 | 3,875.09 | 9,591.57 |
| May | 61,871.86 | 54,449.54 | 6,638.68 | 1,722.75 | 10,524.09 | 11,463.20 |
| June | 75,518.85 | 63,509.97 | 6,614.56 | 1,722.75 | 4,357.70 | 686.13 |
| July | 76,271.87 | 59,834.74 | 6,499.49 | 1,722.75 | 7,215.12 | 999.77 |
| Aug. | 74,852.23 | 54,063.93 | 6,930.22 | 1,722.75 | 7,716.51 | 4,418.82 |
| Sept. | 82,640.15 | 54,816.73 | 6,872.34 | 1,722.75 | 9,858.13 | 9,370.20 |
| Oct. | 77,870.38 | 57,427.55 | 6,758.52 | 1,722.75 | 6,592.79 | 5,368.77 |
| Nov. | 62,478.56 | 52,267.41 | 6,759.48 | 1,722.75 | 7,642.63 | 5,913.71 |
| | $849,580.43 | $675,747.38 | $82,885.12 | $21,420.22 | $81,562.29 | $12,034.58 |

283

| | 1896 Earnings. | Expenses. | Leased Line Rentals. | Taxes. | General Interest. | Surplus. |
|---|---|---|---|---|---|---|
| Dec. ..... | $ 62,827.14 | $ 48,471.97 | $ 6,783.58 | $ 1,610.85 | $ 9,501.87 | $ 3,541.13 |
| 1897. | | | | | | |
| Jan. ..... | 61,062.76 | 50,797.79 | 6,768.12 | 1,834.65 | 6,700.39 | 5,038.19 |
| Feb. ..... | 58,975.12 | 51,866.24 | 10,845.35 | 1,722.75 | 11,780.96 | 17,240.18 |
| Mar. ..... | 56,367.57 | 50,375.37 | 8,905.69 | 1,722.75 | 5,908.74 | 10,544.98 |
| Ap-l ..... | 61,317.56 | 52,650.81 | 9,472.04 | 1,722.75 | 12,610.29 | 15,138.33 |
| May ..... | 55,563.48 | 80,308.62 | 9,016.94 | 1,722.75 | 8,709.29 | 44,194.12 |
| | $356,113.63 | $334,470.80 | $51,791.72 | $10,336.50 | $55,211.54 | $95,696.93 |
| | $1,205,694.06 | $1,010,218.18 | $134,676.84 | $31,756.72 | $136,773.83 | $107,731.51 |

(9-25-01.)

284 McGOWAN Ex. 6 A.

Columbus, Sandusky & Hocking R. R. Co.

*Money Acquired by Loan and Sale of Bonds.*

| | | |
|---|---|---|
| September, 1896 | $12,000.00 | |
| December, 1896 | 73,075.00 | |
| January, 1897 | 12,494.44 | |
| February, 1897 | 17,000.00 | |
| March, 1897 | 21,381.98 | |
| April, 1897 | 3,829.83 | |
| | | $139,781.25 |

(12-12-01.)

McGOWAN'S Ex. 7 A.

C., S. & H. R. R. Co.

*Sundry Operating Expenses Unpaid June 1, 1897.*

| | | |
|---|---|---|
| Accounts Payable: | | |
| December, 1896 | $ 555 53 | |
| January, 1897 | 1,421 04 | |
| February, 1897 | 3,452 30 | |
| March, 1897 | 4,567 78 | |
| April, 1897 | 6,362 66 | |
| May, 1897 | 15,131 32 | $31,490 63 |
| Pay-rolls: | | |
| April, 1897 | 17,100 39 | |
| May, 1897 | 38,684 79 | |
| Unclaimed wages prior Apl 1, 97 | 182 38 | $55,967 56 |
| | | $87,458 19 |

(12-20-01.)

Above statement does not include all unpaid operating expenses.

McGowen I B.

Columbus, Sandusky & Hocking R. R. Co.

*Receipts From Railway Company & Receiver.*

| | | Railway Co. | Receiver. | Totals. |
|---|---|---|---|---|
| 1895. | | | | |
| Nov. | | $ 192 69 | $ 39,392 01 | $ 39,584 70 |
| McGowan Ex. 7 A. | | | | |
| Dec. | | 460 69 | 119,152 74 | 119,613 43 |
| 1896. | | | | |
| Jan. | | 348 71 | 56,323 67 | 56,672 38 |
| | Feb. | 798 53 | 21,039 59 | 21,838 03 |
| 285 | Mar. | 163 66 | 507 77 | 671 43 |
| | April | 1,053 85 | 7,216 34 | 8,270 19 |
| May | | 1,692 58 | 6,477 05 | 8,169 63 |
| June | | 366 84 | 32,075 03 | 32,441 87 |
| July | | 74 83 | 55 49 | 130 32 |
| Aug. | | 160 84 | 205 65 | 366 49 |
| Sept. | | 2,453 40 | 48 05 | 2,501 45 |
| Oct. | | 10 00 | 17 22 | 27 22 |
| Nov. | | 933 39 | 93 27 | 1,026 66 |
| | | $ 8,710 01 | $282,603 79 | $291,313 80 |
| Dec. | | 139 15 | 48 07 | 187 22 |
| 1897. | | | | |
| Jan. | | 483 76 | | 483 76 |
| Feb. | | 43 37 | 6 67 | 50 04 |
| Mar. | | 308 24 | 72 61 | 380 85 |
| April | | 374 69 | 622 78 | 997 47 |
| May | | 22 00 | 27 13 | 49 13 |
| | | $ 1,371 21 | $ 777 26 | $ 2,148 47 |
| Totals | | $10,081 22 | $283,381 05 | $293,462 27 |

(12-12-01.)

McGowan Ex. IA.

Columbus, Sandusky & Hocking Railroad Co.

*Payments for Old Debts—Railway Company and Receiver.*

| 1895. | Railway Co. | Receiver. | Totals. |
|---|---|---|---|
| Nov. | $ 2,510 64 | $ 4,033 59 | $ 6,544 23 |
| Dec. | 50,033 63 | 44,731 61 | 94,765 24 |
| 1896. | | | |
| Jan. | 180,260 20 | 18,405 57 | 198,665 77 |
| Feb. | 46,531 76 | 2,277 75 | 48,809 51 |
| Mar. | 9,123 92 | 2,626 70 | 11,750 62 |
| April | 3,111 95 | 1,846 61 | 4,958 56 |
| May | 8,285 57 | 3,867 94 | 12,153 51 |
| June | 2,815 14 | 307 42 | 3,122 56 |
| July | 975 39 | 3,659 39 | 4,914 38 |
| Aug. | 1,256 84 | 5,657 54 | 6,914 38 |
| Sept. | 4,551 84 | 398 14 | 4,949 98 |
| Oct. | 883 05 | 214 29 | 1,097 34 |
| Nov. | 1,479 53 | 296 11 | 1,775 64 |
| | $311,819 46 | $88,322 66 | $400,142 12 |
| 286 1896. | | | |
| Dec. | 896 73 | 2 23 | 898 96 |
| 1897. | | | |
| Jan. | 1,342 51 | | 1,342 51 |
| Feb. | 1,505 72 | 30 56 | 1,536 28 |
| Mar. | 3,292 03 | 31 87 | 3,323 90 |
| April | 11,309 77 | 358 80 | 11,668 57 |
| May | 667 66 | 56 67 | 724 33 |
| | 19,014 42 | 480 13 | 19,494 55 |
| Totals | $330,833 88 | $88,802 79 | $419,636 67 |

(12-12-01.)

## Columbus, Sandusky & Hocking R. R. Co.

*Payments for Permanent Improvements, Betterments, &c.*

| 1895. | Machinery. | Sidings, B-l-gs. | Equipment, &-. | Land. | Total. |
|---|---|---|---|---|---|
| Nov. | ——— | | | | |
| Dec. | ——— | ——— | $1,200 00 | ——— | $ 1,200 00 |
| 1896. | | ——— | ——— | ——— | ——— |
| Jan. | ——— | | | | |
| Feb. | $ 77 02 | $ 33 15 | ——— | ——— | 33 15 |
| Mar. | 59 94 | 124 35 | ——— | ——— | 201 37 |
| April | 14 84 | 202 79 | 273 59 | ——— | 536 32 |
| May | 5,997 79 | 177 34 | 275 30 | ——— | 467 58 |
| June | 25 98 | 229 13 | 50 74 | ——— | 6,277 66 |
| July | ——— | 265 55 | 46 27 | ——— | 337 80 |
| Aug. | 861 25 | 485 13 | 41 49 | ——— | 526 62 |
| Sept. | ——— | 450 91 | ——— | $200 00 | 1,512 16 |
| Oct. | ——— | 379 51 | ——— | ——— | 379 51 |
| 288 Nov. | ——— | 638 10 | ——— | ——— | 638 10 |
| | ——— | 400 70 | ——— | 100 00 | 500 70 |
| | $7,036 92 | ——— | ——— | ——— | ——— |
| | | $3,386 66 | $1,887 39 | $300 00 | $12,610 97 |
| Dec. | ——— | | | | |

| | | | | | |
|---|---|---|---|---|---|
| 1897. | | | | | |
| Jan. | ——— | 359 45 | 787 95 | ——— | 1,147 40 |
| Feb. | ——— | 766 14 | 861 22 | 1,225 80 | 2,853 16 |
| Mar. | ——— | 564 99 | 495 43 | 51 40 | 1,111 82 |
| April | ——— | 376 72 | 1,735 18 | 1,180 00 | 3,291 90 |
| May | ——— | 822 47 | 747 40 | ——— | 1,569 87 |
| | ——— | 155 68 | 1,890 60 | ——— | 2,046 28 |
| | | $3,045 45 | $6,517 78 | $2,457 20 | $12,020 43 |
| Totals | $7,036 92 | $6,432 11 | $8,405 17 | $2,757 20 | $24,631 40 |

(12-12-01.)

289 Mr. WILLIAM MCGOWAN, being duly sworn, testified as follows:

Examined by Mr. Cleveland, of Cleveland & Bowler.

Q. 1. Where do you live, Mr. McGowan?

A. Baltimore, Maryland. I am with the General Auditor of the B. & O. R. R. Co.

Q. 2. How long have you lived there?

A. Since October, 1900.

Q. 3. Where did you live before that time?

A. Madisonvile was my place of residence and employed in Cincinnati.

Q. 4. In what capacity?

A. Chief Clerk of the Auditor of the B. & O. S. W. R. R. Co.

Q. 5. How long have you been connected with them in that capacity?

A. Since 1890.

Q. 6. During that time you have been in the Auditor's office?

A. Yes, sir.

Q. 7. Are you familiar with railway bookkeeping?

A. Yes, sir.

Q. 8. Were you prior to 1900?

A. Yes, sir.

Q. 9. In what way?

A. I was Chief Bookkeeper for the C. W. & B. and M. & C. Ry., but I forget whether I was assistant or chief bookkeeper of the M. & C. Ry. Co.

Q. 10. All together you have been how long with the auditing department of the railway companies?

A. 27 years.

Q. 11. Did you make an examination of the books of the C. S. & H. Railway Co. from the time of its organization to the appointment of the Receiver in this case with a view to seeing what its receipts and expenditures had been during that period of the analysis thereof?

A. Yes, sir; I did.

Q. 12. Did you prepare tables of that sort showing these results?

A. Yes, sir.

Q. 13. Have you them with you?

A. Yes, sir.

Q. 14. I wish you would produce them, please?

A. These are the statements that I prepared in September and here is the single statement that I prepared today.

290 Q. 15. Are these, Mr. Gowan, correct tabulations and transcripts from the books of the company?

A. Yes, sir.

By Mr. CLEVELAND:

I will offer in evidence a paper headed C. S. & H. R. R. Co., Payment of Old Debts of Railway Co. and Receiver, divided into two payments for the Railway Co. and for the Receiver prior and subsequent to December 1st, 1896; also showing receipts from the Railway Co. and the Receiver prior and subsequent to December 1st, 1896, respectively, and ask that the Master mark the same "McGowan Ex. 1".

Objection by Mr. WAITE:

I object to the offering of any testimony which alleged diversion prior to a period of six months before the appointment of Felton as Receiver, on the ground that these claimants are not interested in any diversion prior to the dates to which the claims were incurred respectively.

By Mr. CLEVELAND:

Q. 16. Have you also, Mr. McGowan, prepared a tabulated statement of this same exhibit marked "McGowan Ex. 1" showing the payments of old debts of the Railway Company and Receiver by months?
A. Yes, sir.

By Mr. CLEVELAND:

I will offer that and ask the Master to mark it "McGowan Ex. 1A".

Q. 17. And have you also prepared a tabulated statement of the receipts from the Railway Co. and Receiver showing those receipts and from those sources by months?
A. Yes, sir; that is the other side of the receipts.

By Mr. CLEVELAND:

I ask that that be marked "McGowan 1B". I also offer in evidence statements produced by witness headed C. S. & H. R. R. Co., Payments for Car Trust Notes and interest on same, which I will request the Master to mark "McGowan Ex. 2". I also offer in evidence the statement produced by the witness headed C. S. & H. R. R. Co., payments for permanent improvements, betterments, etc., which I ask the Master to mark "McGowan Ex. 3".

Q. 18. Did you also prepare an analysis of that statement by months showing payments for betterments and improvements?

A. Yes, sir.

By Mr. Cleveland:

I offer that in evidence and ask that it be marked "McGowan Ex. 3A". I also offer in evidence a paper headed C. S. & H. R. R. Co., payments for interest on bonds, notes,
291 etc., which I offer in evidence and ask to be marked "McGowan Ex. 4." I also offer in evidence paper headed Recapitulation, which consists of the prior Exhibits 1, 2, 3 and 4, and which I ask the Master to mark "McGowan Ex. 5". I also offer in evidence paper produced by the witness headed C. S. & H. R. R. Co., money acquired by loans and sale of bonds from December 1st, 1898, to May 31st, 1897, which I offer in evidence and ask the Master to mark "McGowan Ex. 6".

Q. 19. Mr. McGowan, in connection with this Ex. 6, showing money acquired by loans and sale of bonds, did you prepare a tabulated statement showing it by months from December, 1896, to June, 1897, also carrying it back as far as September, 1896?

A. Yes, sir; that is the paper.

By Mr. Cleveland:

I offer that in evidence and ask the same to be marked "McGowan Ex. 6A".

Q. 20. Will you state, Mr. McGowan, outside of the receipts, as shown by these exhibits, from the old Railway Co. and the Receiver of the old Railway Co., and receipts from money acquired by loans and sale of bonds, what other source of income is shown by the books of the Railroad Co.?

A. There were other sources, but I could not explain to you, I did not make any record of it, I confined my search to the items you specified.

Q. 21. Did you prepare a statement from the books of the company?

A. I made a copy of the statement which I took from the books of the C. S. & H. R. R. Co.

Q. 22. You have that statement?

A. Yes, sir; it is here.

Q. 23. Is this the paper you prepared and was it taken from the books of the company?

A. Yes, sir.

Q. 24. Did you take it from the books of the company as you found it?

A. It is a copy of the statement from one of their books.

By Mr. CLEVELAND:

I will offer to you in evidence a paper headed, Earnings, Operating Expenses and Deductions, which I will ask that the Master mark "McGowan Ex. 7".

I assume, Mr. Master that your prior report and the prior evidence is before you?

A. Yes, sir.

For instance, Mr. Fisher brought an affidavit showing
292 the total amount of claims against the Railway Co. at the time it failed. I assume you have that before you?

A. Yes, sir.

Q. 25. In connection, Mr. McGowan, with this statement Ex. No. 7 taken from the books and showing earnings, operating expenses, deductions, I will ask you if you have examined the books in connection with the expenses shown in that statement, and, if so, whether you can tell whether those items which aggregate largely as expense had or had not at that time of the appointment of the Receiver June 1st, 1897, been paid?

A. I made what might be called a partial examination with that end in view. I have prepared a statement showing that a large amount of the operating expenses were not paid June 1st, 1897, but I do not want this statement to be a full report of all the unpaid items, as I did not have the time to examine each item of the expenses report.

Q. 26. But the extent of this last statement, last referred to, is the result of an examination of these items entered in this account in "Ex. 7" by months, and were not paid at the time of the appointment of the Receiver?

A. Yes, sir.

Q. 27. From the examination of the books in this connection what did you find to have been the course of business of the Railway Co. and its system of bookkeeping as to the entry of expense in the books whether or not they had been paid?

A. The operating expenses were referred to in accounts payable and registered, but to make the total expense they had reports from their storekeeper of the materials used during the month and made journal entries. This report before is only the items shown on the register as unpaid during the last six months.

Q. 28. Although in this statement in "Ex. 7", they are included in the totals of expenses?

A. Yes, sir.

Q. 29. What is this column of lease line rentals?

A. These, I think, are operating expenses and I do not know their object in carrying them separately.

Q. 30. Does it not represent rentals paid for this line?

A. Yes, sir; for tracks.

Q. 31. What about taxes?

A. The last six entries could not have been paid from my own knowledge, as tax bills are not rendered until the 1st of June.

Q. 32. And this item of general interest, did you make it out?

A. I looked at the journal and ledger and found that
293 they had made an entry each month with the amount of the interest accrued each month.

Q. 33. Interest on what?

A. Notes, bonds and coupon notes, several things.

Q. 34. Is this the partial analysis which you have referred to as the operating expenses in "McGowan Ex. 7" headed C. S. & H. R. R. Co., Sundry Operating Expenses Unpaid June 1, 1897?

A. Yes, sir.

By Mr. CLEVELAND:

I will offer it in evidence and ask it to be marked "Ex. 7A".

Q. 35. If I understand you correctly, Mr. McGowan, this "Ex. 7" showing expenses, among other things, includes all expenses whether paid or unpaid on the 1st of June, 1897?

A. Yes, sir.

Q. 36. All that column of expenses you have had analyzed as accounts payable and pay-rolls as shown by Ex. 7A and and found to be eighty-seven thousand and some odd dollars, does that include all expenses that were unpaid in June, 1897?

A. No, sir.

Q. 37. You say there are others which would be represented by claims in other expenses not included in Ex. 7A, would be represented by the claims which were outstanding against the road?

Objection by Mr. WAITE:

I object to this question, as it is misleading.

Mr. Cleveland withdraws the question.

Q. 38. Does this statement of yours, Mr. McGowan, "Ex. 7A", include traffic balance?

A. No, sir; I do not understand that it does. I do not think it included traffic balances.

Q. 39. I do not suppose you examined the books of the Receiver?

A. No, sir; I did not.

Q. 40. You do not know what portion of that expense incurred by the Railway Co. was actually paid by the Receiver, do you?

A. No, sir.

Q. 41. Such as the pay-rolls for April and May?

A. No, sir.

Q. 42. You simply examined the books of the Railway Co. from the start to the winding up?

A. Yes, sir.

Motion by Mr. RODGERS to strike out all the testimony that has been introduced here in behalf of any of the six months' claim-
294 ants to a period of time anterior to six months prior to the time when their respective claims became claims against the Railroad Company, upon the ground that the testimony is irrelevant and on the further ground it is not within the scope of the order of reference.

The Master sustains the motion. Mr. Cleveland excepts on behalf of the six months' claims and again tenders the evidence.

Objected to. Objection sustained.

Mr. WAITE also objects for the purpose of preserving the rights of the two Trust Companies. Mr. RODGERS, on behalf of the interests represented by him at this hearing reserves the right to insist at the hearing that none of the evidence offered and admitted relating to diversion of earnings not concurrent in point of time with claims, can be considered.

Cross-examination.

By Mr. RODGERS:

Q. 1. Mr. McGowan, referring to your "Ex. 3A" and to the figures 86,517.78 showing payments upon equipments from December, 1896, to and including May, 1897, I wish to ask you whether you can state what was the nature of these expenditures?

A. Quite a great deal was for couplers. A good deal of the money, I understand, was for couplers, I know of my own per-

sonal knowledge that the Interstate Committee Commission insisted upon these couplers.

Q. 2. Can you state what portion was for couplers?

A. Yes, I can figure that out, $6,400 out of the $8,400.

Q. 3. Referring to the figures $311,819.46 in your "Ex. No. 1" entitled "Payments for Old Debts of Railway Co. and Receiver," as to which you have added the qualifying statement that of those figures $135,172.82 was paid Stearns & Hoover with bonds, were not the figures $311,819.46 compiled generally without reference to whether the payments were made in cash or in bonds?

A. Yes, sir.

By Mr. WAITE:

Q. 1. And that is true is it not of all the figures of that Exhibit?

A. Yes, sir.

By Mr. RODGERS:

Q. 4. Mr. McGowan in reference to your Ex. No. 7, being the tabulated statement of earnings, operating expenses and deductions I understand from your direct examination that you did not make this analysis yourself, you merely took the tabulated statement you found on the books?

295 A. Yes, sir.

Q. 5. You did not make any examination to see whether these figures under the earnings column were actual cash receipts or not?

A. I did not make any direct examination.

Re-direct.

By Mr. CLEVELAND:

Q. 1. Mr. McGowan referring to that Exhibit and your answer to all the figures of that Exhibit "Payments for Old Debts of Railway Company and Receiver," I want to ask as to what extent payments were made for the old Railway Company or Receiver of the Railway Company, with bonds other than this $135,172.82 which you note on the statement?

A. None whatever.

Q. 2. What then did you mean by your answer to that question?

A. I find that I did not clearly understand the question and if I had to answer it now I would answer it exactly opposite to that and my statement would be cash.

Q. 3. You are sure there are no other similar payments?
A. I find no other.

By Mr. WAITE:

Q. 1. Can you state now to whom each of those payments were made which aggregate this $30,000.
A. Not to whom. I have no record to whom they were made.

By Mr. CLEVELAND:

Q. 1. This Ex. No. 7, is a tabulation from what book? Did you take that from the Railway Company as earnings, operating expenses and deductions?
A. I took that as I remember it now from a memorandum handed me by the Auditor of the C. S. & H. Railway Co.
Q. 2. Purporting to be what?
A. Just what it is headed "Copy."
Q. 3. From your examination of the books are you able to tell what the column earnings was made up from?
A. From the mailing, freight, passenger and express earnings.
Q. 4. Are you able to state whether it is made up of the correct freight, express, mailing, cash, etc.?

Objection by Mr. RODGERS:

A. I copied the statement Mr. Cleveland, in the office and personally I know that it consists of these items.
Q. 5. How do you know that?
A. From looking through the ledger, journal at the time I made the examination.

296 Mr. McGOWAN re-called for examination by Mr. CLEVELAND:

Q. 1. Referring to your Ex. No. 1 showing payments for old debts of Railway Company and Receiver, I want to ask you if either of these two items $311,819.46 and $19,014.42 includes an item under date of March 2nd, 1897, of the payment of a note to the Deshler National Bank of $6,000.00?
A. No, sir.
Q. 2. Does either of these items include an item of a payment of $1,000.00 under date of December 31st, 1896, to J. McKelvey?
A. No, sir.
Q. 3. Does either of these items in your record show pay-

ments under date of April 9th, 1897, to P. W. Huntington of $10,000.00?

A. No, sir.

By Mr. WAITE:

Q. 1. Have you the details here Mr. McGowan which make up the amount paid by the Railroad Co. of Railway Co. indebtedness in the month of April 1897?

A. Yes, sir.

Q. 2. It is eleven thousand odd dollars?

A. I think it is.

Q. 3. You have the details here to whom payments were made?

A. No, sir.

Q. 4. You can tell what makes up that $11,000.00?

A. No, sir, I have the dates and the amounts.

Q. 5. There is no $10,000.00 item as far back as the 9th?

A. Not on the 9th.

Q. 6. Is there any that month?

A. On the 20th.

Q. 7. Do you know to whom that was made?

A. No, sir.

Q. 8. Have you looked over the books since you were here this morning in any aspects of the matter?

A. No, sir.

Counsel for the six months claimants offers in evidence the blank form of printed contract between the Union Depot of Columbus, of the first part, and party of the second part, and it is admitted by counsel for the Trust Companies that the C. S. & H. R. R. Co., as operated by the Receiver now, is using the Union Depot under an agreement which is in all respects the same as is offered in evidence marked Ex. A.

297 MERION'S EXHIBIT A.

*Receipts from sources other than earnings.*

Six month's prior to Dec. 1st, 1896.

| | | |
|---|---|---|
| 7-20-98. | For notes given H. W. Putnam, dated July 22-96 at 4 mos. 6 per cent. ..... | $30,000.00 |
| 9-8-96. | Received from Hatch & Foote, proceeds of sale 5 F. Mtg. Bonds, same sold to J. F. Greenough ..... | 5,000.00 |

| | | | |
|---|---|---|---|
| 1-96. | Received from Hatch & Foote, proceeds of sale of 7 F. Mtg. Bonds ..... | 7,000.00 | $62,000.00 |

Six Month's subsequent to Dec. 1st, 1896.

| | | |
|---|---|---|
| Amount as shown in statement heretofore as money acquired from loans ..... | | $248,493.79 |
| | | $310,493.79 |

MERION'S EXHIBIT B.

C., S. & H. R. R. Co.

*Money Acquired by Loans and Sales of Bonds and from Other Sources than Current Earnings, December 1, 1896, to May 31, 1897*

From Guaranty Trust Company, Note at 6 Mos. from Dec. 26, 1896.

| | | | |
|---|---|---|---|
| 12-31-96. | Vouchers paid ..... | $27,075.00 | |
| 1-9-97. | Vouchers paid ..... | 6,494.44 | |
| 1-25-97. | Pay-rolls ..... | 6,000.00 | |
| 3-11-97. | Cash (into treasury) ..... | 430.56 | |
| | | | $40,000.00 |

The above note secured by 56 first mortgage bonds.

| | | | |
|---|---|---|---|
| 2-23-97. | Deshler National Bank ..... | $25,000.00 | |
| 3-16-97. | Deshler National Bank ..... | 16,000.00 | |
| | | | $41,000.00 |

Deshler National Bank paid the above amount Apr. 22, 1897, and note given H. W. Putnam at 20 days from April 22, 1897, secured by 65 first mortgage bonds. Cash received and disbursed as follows:

| | | | | |
|---|---|---|---|---|
| 298 | 2-23-97. | Pay-rolls ..... | $17,000.00 | |
| | 3-5-97. | Car trust notes and interest ..... | 5,019.31 | |
| 3-25-97. | | Car trust notes and interest ... | 2,980.69 | |
| 3-31-97. | | Pay-rolls ..... | 13,170.17 | |
| 4-26-97. | | Car trust notes and interest .. | 3,829.83 | |
| | | | | $41,000.00 |

From Hatch & Foote, loan of Dec. 22, 1896, and afterwards taken up by note of H. W. Putnam for $41,000.00, 62 first mortgage bonds and note for $5,000, to C. F. Dean with 7 first mortgage bonds as security.

| | | | |
|---|---|---|---|
| 12-22-96. | Pay-rolls | $32,000.00 | |
| 12-24-96. | Pay-rolls | 3,200.00 | |
| 12-29-96. | Car trust notes and receiver certificate interest | 1,462.34 | |
| 12-29-96. | Car trust notes and receiver certificate interest | 9,337.66 | |
| | | | $46,000.00 |

First Mortgage Bond Scrip.

| | | |
|---|---|---|
| 3-15-97. | Issued to D. S. Gray to pay voucher | 781.25 |

Memo. in regard to sale of $12,000 is correct. Bonds were sold in Sept., 1896, and therefore not included in above statement. Money acquired as follows and not shown in McGowan's statement:

| | | | |
|---|---|---|---|
| 3-2-97. | 6 first mortgage bonds in payment of note, $6,000, given Oct. 27, 1896, to Deshler Nat-l Bank | $6,000.00 | |
| 5-31-97. | 5 first mortgage bonds to Lawrence Maxwell, in payment of services. | $5,000.00 | |
| 12-31-96. | 1 first mtg. bond to J. McKelvey, in payment interest on bonds. | $1,000.00 | |
| 4-9-97. | P. W. Huntington received bonds for note | 10,000.00 | |
| | | | $22,000.00 |
| | Total | | $149,781.25 |
| 299 | Amount obtained within six mos. of June 1st, 1897, from mileage book sales | $129,000.00 | |
| | Of which amount there was collected on behalf of mileage sold for connecting railroad companies and not accounted for to them | | 98,712.54 |
| | | | $248,493.79 |

*C., S. & H. Railway Co. Car Trust Notes and Interest Thereon Paid by C., S. & H. R. R., June 1st, 1896, to May 31, 1897.*

June, 1896.

| Date Paid. | Amount. |
|---|---|
| 1st | $1,117.70 |
| 6th | 1,862.83 |
| 8th | 1,701.62 |
| 11th | 500.00 |
| 19th | 500.00 |
| 19th | 2,347.52 |
| 23rd | 5,000.00 |
| 25th | 2,117.73 |
| Total | $15,147.40 |

July, 1896.

| Date Paid. | Amount. |
|---|---|
| 2d | $1,117.70 |
| 6th | 3,446.39 |
| 9th | 1,701.62 |
| 18th | 500.00 |
| 20th | 2,347.52 |
| 21st | 5,000.00 |
| 24th | 2,117.73 |
| 30th | 1,083.56 |
| 31st | 1,117.70 |
| Total | $18,432.22 |

August, 1896.

| Date Paid. | Amount. |
|---|---|
| 4th | $500.00 |
| 300 6th | 1,862.83 |
| 10th | 1,701.62 |
| 17th | 500.00 |
| 18th | 2,347.52 |
| 21st | 5,000.00 |
| 25th | 2,117.73 |
| 31st | 1,083.56 |
| Total | $15,113.26 |

September, 1896.

| Date Paid. | Amount. |
|---|---|
| 4th | 500.00 |
| 16th | 2,347.52 |
| 18th | 500.00 |
| 23rd | 2,347.52 |
| 23rd | 5,000.00 |
| 29th | 2,117.73 |
| 29th | 1,083.56 |
| Total | $13,896.33 |

October, 1896.

| Date Paid. | Amount. |
|---|---|
| 3rd | 500.00 |
| 12th | 2,351.97 |
| 19th | 500.00 |
| 23rd | 2,347.52 |
| 21st | 5,000.00 |
| 24th | 1,083.56 |
| 27th | 2,117.73 |
| Total | $13,900.78 |

November, 1896.

| Date Paid. | Amount. |
|---|---|
| 5th | $ 500.00 |
| 14th | 2,500.00 |
| 19th | 500.00 |
| 21st | 5,000.00 |
| 23rd | 2,347.52 |
| 30th | 2,117.73 |
| Total | $12,965.25 |



December, 1896.

| Date Paid. | Amount. |
|---|---|
| 1st | 1,069.57 |
| 3rd | 500.00 |
| 7th | 1,782.62 |
| 15th | 500.00 |
| 23rd | 5,000.00 |
| 24th | 2,500.00 |
| 24th | 2,117.73 |
| 29th | 2,347.52 |
| 31st | 1,069.57 |
| Total | $16,887.01 |

January, 1897.

| Date Paid. | Amount. |
|---|---|
| 5th | $ 500.00 |
| 7th | 1,782.62 |
| 12th | 2,500.00 |
| 20th | 500.00 |
| Total | $5,282.62 |

February, 1897.

| Date Paid. | Amount. |
|---|---|
| 1st | $1,069.57 |
| 4th | 2,167.12 |
| 4th | 2,347.52 |
| 4th | 5,000.00 |
| 8th | 1,862.83 |
| 8th | 500.00 |
| 23rd | 500.00 |
| 23rd | 2,117.73 |
| Total | $15,564.77 |

March, 1897.

| Date Paid. | Amount. |
|---|---|
| 3rd | $500.00 |
| 5th | 4,939.10 |
| 15th | 500.00 |
| 25th | 2,377.28 |
| 25th | 4,235.46 |
| 25th | 2,347.52 |
| 31st | 1,069.57 |
| Total | $15,968.93 |

302 April, 1897.

| Date Paid. | Amount. |
|---|---|
| 5th | $ 500.00 |
| 6th | 1,782.62 |
| 10th | 10,000.00 |
| 22nd | 500.00 |
| 26th | 2,347.52 |
| 29th | 5,000.00 |
| Total | $20,130.14 |

May, 1897.

| Date Paid. | Amount. |
|---|---|
| 1st | $2,117.73 |
| 2nd | 1,069.57 |
| 4th | 500.00 |
| 6th | 1,782.62 |
| 11th | 1,077.38 |
| 17th | 2,167.12 |
| 20th | 500.00 |
| 22nd | 5,000.00 |
| Total | $14,214.42 |

MERION'S EX. C.

*Union Depot Viaduct Account.*

Total cost of construction of High Street Viaduct, $500,000.00 to be paid in ten years.

C. S. & H. pays its proportion of one-fourth of cost based on number of trains in and out of Union Depot.

| | Date Paid. | Vchr. No. | Date. | Amount. | |
|---|---|---|---|---|---|
| | 1-28-96 | 199 | Dec., 1895 | $1,807.27 | |
| | 2-22-96 | 648 | Jan., 1896 | 2,275.67 | |
| | 3-26-96 | 570 | Feb., 1896 | 2,151.15 | |
| | 4-25-96 | 467 | Mch., 1896 | 102.54 | |
| | 5-25-96 | 436 | Apr., 1896 | 240.40 | |
| | 6-25-96 | 478 | May, 1896 | 205.25 | |
| | | | | | $6,782.28 |
| | 7-23-96 | 273 | June, 1896 | 215.15 | |
| | 5-24-97 | 416 | July, 1896 | 273.08 | |
| | 3-24-97 | 240 | Aug., 1896 | 209.30 | |
| | 4-24-97 | 283 | Sep., 1896 | 214.59 | |
| 303 | 2-24-97 | 378 | Oct., 1896 | 81.01 | |
| | 12-24-96 | 510 | Nov., 1896 | 84.07 | |
| | | | | | 1,077.20 |
| | 1-29-97 | 447 | Dec., 1896 | 74.15 | |
| | 2-24-97 | 361 | Jan., 1897 | 120.33 | |
| | 3-23-97 | 505 | Feb., 1897 | 81.71 | |
| | 4-24-97 | 429 | Mch., 1897 | 82.98 | |
| | 5-22-97 | 368 | Apr., 1897 | 83.27 | |
| | 6-24-97 | 446 | May, 1897 | 102.08 | |
| | | | | | 644.52 |
| | Total | | | | $8,404.00 |

Mr. MERION being first duly sworn, testified as follows:

By Mr. RODGERS:

Q. 1. What is your name?
A. James E. Merion.
Q. 2. What position do you hold?
A. Auditor for the Receiver.
Q. 3. How long have you been connected with the C., S. & H. Railroad?
A. Twelve years.
Q. 4. In what capacity?
A. As clerk, traveling auditor and chief clerk.
Q. 5. In what department?
A. In the accounting department.
Q. 6. Are you familiar with the books of the company?
A. I am.
Q. 7. I hand you a series of papers and ask you to state if they are compilations by you from the books of the company?
A. Yes, sir.
Q. 8. From the books of the company, in the office?
A. Yes, sir.

I offer them in evidence and mark them Merion's Exhibits A, B, C and D. Exhibit A, being statement of receipt of the company from sources other than earnings for six months prior to December 1st, 1896, Exhibit B, being statement of money acquired by loans and sale of bonds and from other sources than current earnings from December 1st, 1896, to May 31st, 1897. Exhibit C being a statement of payments made by the C. S. & H. R. R. Co. on the Union Depot Viaduct account. Ex-
304 hibit D being tabulated statement of payments made by the C. S. & H. R. R. Co. from June 1st, 1896, to May 31, 1897, on Car Trust notes and interest thereon.

Q. 9. Mr. Merion, referring to your Ex. C Union Depot Account, I will ask you what were these payments made for?
A. Made for its portion of the cost. The city had to pay for the construction of the viaduct.
Q. 10. Who had the title of that?
A. The Union Depot.
Q. 11. Was that included under the mortgages of the C. S. & H. Ry. Co.?
A. Not at all.
Q. 12. Does the C. S. & H. use the viaduct?
A. It does not.

Q. 13. Referring to your Ex. B I will ask you in addition to the statement of money acquired by loans and sale of bonds and from other sources than current earnings from December 1st, 1896, to May 31st, 1897, if that exhibit does not also show the uses of the money was put?

A. Yes, sir; that shows everything.

Q. 14. I hand you Mr. McGowan's Ex. No. 1, "Payments for Old Debts of Railway Company and Receiver," and refer to the following items contained therein: "Railway Co.—prior to Dec. 1st, 1896—$311,819.46; subsequent to Dec. 1st, 1896, $19,014.42, extended $330,833.88," as to which Mr. McGowan has made an annotation that the items in question includes $135,172.82 paid to Sterns & Hoover, and ask you whether the figures do not also include other payments made by the Railway Company with bonds?

A. Yes, sir. I will add there $22,000.00 in the first item, and I also add, the $22,000 is $6,000.00 paid the Deshler National Bank, $5,000.00 in bonds to Lawrence Maxwell in payment of services, one first-class mortgage bond to J. McKelvey in payment of interest on bonds and $10,000.00 to P. W. Huntington. This is Railway Company indebtedness.

Q. 15. Mr. Merion, will you give us as nearly as possible the dates of the payments made with the bonds of the company to which you referred in the last question?

A. Six first mortgage bonds to Deshler National Bank, as appears by my exhibit under date of March 2nd, 1897, five first mortgage bonds to Lawrence Maxwell under date of May 31st, 1897, one first mortgage bond to J. McKelvey under date of December 31st, 1896, ten mortgage bonds to P. W. Huntington under date of April 9th, 1897.

305 Q. 16. Mr. Merion the payment of 5 first mortgage bonds to Lawrence Maxwell was a payment on account of railroad indebtedness, the question relates to payment made on account of Railway indebtedness?

A. As I understand it you want the dates of the payments that paid Railway Company indebtedness, that is as follows: March 2nd, 1897, $6,000.00 to the Deshler National Bank in bonds, December 31st, 1896, 1 first mortgage bond to J. McKelvey, April 9th, 1897, $10,000.00 to P. W. Huntington, June 13th, 1896, 10 first mortgage bonds to C. N. Haskell.

Q. 17. I hand you Mr. McGowan Ex. No. 7. entitled C. S. & H. R. R. Co., earnings, operating expenses and deductions, and call your attention to the column of figures entitled earnings and referring especially to the earnings from June 1896, to the date of the Felton receivership, and ask you whether the books of the company show that the sums set out were paid in full in cash?

A. No, the books would not show that they were paid in cash in the earnings.

Q. 18. Why?

A. Because there were a great many of the earnings that were not due, traffic earnings, etc.

Q. 19. In other words, the books show that a portion of the earnings were afterwards collected?

A. Yes, sir.

Q. 20. Do you know what proportion?

A. That is hard to say. In the summer there was, I suppose, about 50 per cent. somewhat less in the winter, that would be collected months afterwards not in the current month.

Q. 21. What is the approximate amount of the earnings entered here from June 1st, 1896, to the date of the receivership which were paid after the receivership?

A. There was an earning of $356,000.00 in this six months, of that $356,000.00 I would say that 25 per cent. was collected after June 1st, 1897. Of the first six months prior to that I would say that that had all been practically collected before June 1st.

Cross-examination.

By Mr. CLEVELAND:

Q. 1. Referring back to Ex. No. 1 McGowan, headed Payments for Old Debts of Railway Co. and Receiver, do you know whether these figures include any of the items which you have mentioned as having been paid with bonds in 1897?

A. I think they are included.

306 In what figures?

A. In the first figures $311,819.46, of course some of that would be subsequent to December 1st, 1896.

Q. 3. The figures which you give as included in these three items as paid with bonds, were not paid with bonds until after December 1st, 1896, and therefore how do you know that McGowan in making up this $311,000.00 included Huntington, McKelvey or Deshler National Bank?

A. I can only say that I assume they were paid as my figures were very close to his. I could not check Mr. McGowan's figures with the books.

Q. 4. Would they be included in the $311,000.00 any way if they were paid prior to December 1st, 1897?

A. There is a detailed statement of Mr. McGowan's as to 1897, the $10,000.00 was evidently in there.

Q. 5. What I am asking you about now is whether you mean to testify as to whether any of the three items as deductions in

the old Railway Company are included in the $311,000.00 as having been paid by Mr. McGowan prior to December 1st, 1896?

A. I do not think I can answer that intelligently as I do not know how that $19,000.00 was made up.

Q. 6. Can you say whether the $6,000.00 to Deshler National Bank, $1,000.00 to McKelvey and $10,000.00 to Huntington are included in the $19,000.00 which was paid subsequent to December 1st, 1897?

A. I would have to answer the same as I did to the former question, that I do not know how that $19,000.00 was made up.

Q. 7. Was the Deshler National Bank Note a debt of the Railway Company?

A. Yes, sir.

Q. 8. Was it a renewed note?

A. It was a renewed note.

Q. 9. Signed by whom?

A. I do not know.

Q. 10. Is there anybody in existence who would know how that note was signed?

A. I do not remember how that note was signed at all.

Q. 11. Was it a Railroad Company note?

A. It may have been a Railroad Company renewed note. I think it was renewed several times.

Q. 12. Your statement in Ex. B. shows on its face that it was under the head as money acquired by loans and sale of bonds from other sources than current earnings, six mortgage bonds in payment of a note given October 27th, 1896, to the
307 Deshler National Bank. That was $6,000.00 of bonds of the Railroad Company which were in March 1897, given to the bank in payment of the note which the Railroad Company gave to the bank?

A. That is my impression.

Q. 13. That it was a renewed Railroad Company note?

A. Yes, sir, that it was a renewed Railroad Company note.

Q. 14. And being a Railroad Company note it would not be included in McGowan's Ex. 1?

A. I think it would be because these liabilities of the Railroad Company were kept separate and we charged it back to the Railway Company.

Q. 15. You are unable to check from Mr. McGowan's statement?

A. I am not.

Q. 16. Can you say that as to his figures in his Ex. 1?

A. Yes, sir.

Q. 17. Paid either prior or subsequent to December 1st, 1896, included this $6,000.00 given to the bank?

A. No, I can not check his money acquired on sale of bonds.

Q. 18. What he included to make up his Ex. 1, you can not say whether he included these three terms?

A. No, I can not say as to the $6,000.00 item, the McKelvey and the Huntington item.

Q. 19. Why did the C. S. & H. Ry. Co. pay $8,000.00 to the Union Depot?

A. It was an amount that was assessed on the tenant lines.

Q. 20. Did it use the Union Depot?

A. Yes, sir.

Q. 21. Who assessed it on the line?

A. Union Depot.

Q. 22. In order to continue the use of the Union Depot they had to continue that assessment?

A. Yes, sir.

Q. 23. Does the payment of that assessment give them the right to use that depot?

A. Well I suppose you would say so, because it is rendered in a bill to use with all the rest of the expenses.

Q. 24. What I mean to say now is, does the C. S. & H. R. R. Co. through its receivership, have the right to use the Union Depot by virtue of this assessment?

A. I could not say.

Q. 25. The Union Depot is not covered by a mortgage?

308 A. The Union Depot is covered by a mortgage.

Q. 26. It is not covered by the C. S. & H. mortgage?

A. No, sir. There is some contract about it.

Q. 27. You say there is some contract about it?

A. I understand there is some contract about it, we can leave at any time at the end of the month.

Q. 28. You have a right to continue as long as you pay the rent?

A. Yes, sir.

Q. 29. You have a right to continue to use this right by virtue of paying this assessment?

A. I can not say about that.

Q. 30. Would the C. S. & H. Ry. Co. have had the right to have paid the rental and used the depot if they had refused to pay the assessment?

Objection by Mr. WAITE, because it depends on a contract.

A. I could not say.

Q. 31. What are these $5,000.00 bonds given to Lawrence Maxwell?

A. For services.

Q. 32. For what?

A. For the Poston receivership. Poston was made Receiver for a few days and Maxwell was appointed by the company to have him removed in January, 1897.

Q. 33. You did not acquire any money for this transaction?

A. We had to pay him in bonds.

Q. 34. In other words, you paid a debt for legal services in bonds?

A. Yes, sir.

Q. 35. This $1,000.00 to McKelvey?

A. That was for interest to cover some notes and bonds.

Q. 36. This Huntington matter?

A. That paid two notes, $5,000.00 each.

Q. 37. Old Railway Company notes?

A. They originated with the Railway Co. Car Trust notes.

Q. 38. They paid some notes which the old Railway Company had given?

A. Yes, sir.

Q. 39. How about this mileage book sale of $128,000?

A. That is mileage at that time. We sold books to brokers and various persons and collected the money and it went in to the treasury.

Q. 40. $128,000.00?

A. Yes, sir.

309 Q. 41. It never went into the earnings?

A. No, sir.

Q. 42. What account did that go into?

A. Expense account.

Q. 43. These books were turned over?

A. Yes, sir.

Q. 44. These traffic balances, when the road failed, that were owed to other words, were $98,000.00?

A. Yes, sir.

Q. 45. You sold it for?

A. Various prices, from 17½ up. 17½ was the lowest.

Q. 46. So far as it is of interest to us it did not go to make up the total earnings?

A. No, sir.

Q. 47. What did you do with it?

A. We paid it for anything we had to pay, it went direct to the Treasurer.

Q. 48. Pay off any debts?

A. Yes, sir.

Q. 49. Any mortgage interest?

A. I could not say, because it would lose its identity.

Q. 50. You said all the accounts of earnings was not paid?

A. Yes, sir.

Q. 51. You referred to them as not paid in cash?

A. Not in the current book. For instance, take May showing an earning of $50,000.00, a large part of that would be for coal operators, and they never pay for a month afterwards.

Q. 52. Would you not be able to estimate what these earnings were, collected subsequent to the receivership?

A. I would take months.

Q. 53. Would it be a mere guess for you to say 25 per cent.?

A. I should say, from years of experience, that is about the per cent. collected.

Q. 54. That is, the expense column headed expense, that is a booking column too?

A. As far as it goes it is correct, but a large amount of those expenses were not paid.

Q. 55. There are numbers of claims before the Master as supply and other claims representing those expenses which were not paid. For instance, the Gregg claim?

A. Yes, sir.

Q. 56. The Gregg claim is not in there?

310 A. It was admitted in May and did not go into those expenses.

Q. 57. The lease line rents, were they all paid?

A. No, not to June 1st.

Q. 58. Can you tell us how much of these expenses were not paid when the Receiver was appointed?

A. No, sir.

Q. 59. Can you approximate that?

A. No, sir.

Q. 60. If they amount to $334,000.00, what per cent. would you say?

A. I should say that in last month none of it was paid.

Q. 61. How about April?

A. I remember some April pay-roll was not paid.

Q. 62. Anything else?

A. I could not say, the reason I say May is, because they were very late in vouchering and I know that the voucher registers were made as of May 31st.

Q. 63. This expense in this column does not include traffic balances?

A. No, sir.

Q. 64. These lease line rentals have been paid?

A. I can not say that all have been paid, there was $9,000.00 in May and some in April.

Q. 65. How much in April?

A. About $4,000.00 I should say and all prior to that had been paid.

Q. 66. How about taxes?

A. The taxes would not be paid, these are not due until June.

Q. 67. You prorated that?

A. Yes, sir; I prorated that.

Q. 68. How about the general interest, was none of that paid?

A. I do not think there was any of that six months interest paid except a few items which were due and charged in general and were paid in cash.

Q. 69. Now, if 25 per cent. of these six months' earnings had been collected subsequent to the appointment of a Receiver—$90,000.00—what was done with that?

A. The Receiver got that.

Q. 70. What did he do with it?

A. It went into his cash.

Q. 71. Can you make your statement more accurate as to that?

A. I could not without several weeks' investigation. Every voucher would have to be examined.

311. Q. 72. Would not your last balance sheet show any balance approximately?

A. No, sir.

Q. 73. And these expenses that were unpaid leave out those things which you have mentioned, for those materials that were unused and traffic balances?

A. Yes, sir.

Q. 74. Pay-rolls were included and operating expenses?

A. Yes, sir.

Q. 75. What was the value of the supplies which had been bought according to the inventory of the Receiver and not used?

A. I think we had about $37,000.00 that would not be charged up as an expense until it was used.

Q. 76. Does the difference between this $128,000.00 mileage books and $98,000.00 owed by the Railroad Co., in other words, $50,000.00, mean that $30,000.00 was used on the C. S. & H. R. R. Co.?

A. No, sir; $128,000.00 represents our gross income.

Q. 77. All that mileage that was used on your road?

A. That goes into the earnings.

Q. 78. This $50,000.00 advanced by H. W. Putnam July 20th, "Ex. A."?

A. That loses its identity as far as cash is concerned, I think it was taken largely for pay-rolls.

Q. 79. Do you know whether it was cash advanced at that time or a renewal at any time?

A. I think that that $10,000.00 was taken up and renewed and the $40,000.00 was cash.

Q. 80. When had the $10,000.00 been given?

A. That was given July 1st.

Q. 81. Was that of the $50,000.00 given in July in cash?

A. Yes, sir.

Q. 82. This five and seven thousand dollar item which is mentioned by Mr. McGowan in September, that is correct? Was that the only difference between you, this $50,000.00 going back that far, and these items which were paid in bonds and these mileage books?

A. Yes, sir.

Re-direct examination.

By Mr. RODGERS:

Q. 1. The taxes were paid in December, 1896?

A. Yes, sir.

Q. 2. Six months, of course?

A. Yes, sir.

Q. 3. Referring to that item about $30,000.00 on ac-
312 count of the mileage books which were not taken up by other Railroad Companies, a part of that mileage was redeemed by the Receiver?

A. Yes, sir.

Q. 4. Do you know how much?

A. No, sir. I could not find that out.

United States Circuit Court, for the Southern District of Ohio, Eastern Division.

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| METROPOLITAN TRUST COMPANY OF NEW YORK, *et al.*, Plaintiffs, *vs.* THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, *et als.*, Defendants. | In Equity. No. 887. |

STATE OF OHIO, *Franklin County*, } *ss*:

CASSIUS C. CORNER, being first duly sworn, says that he is the Secretary of The Union Depot Company of the City of Columbus, Ohio, and that said company owns and operates the depot and terminal facilities in said city into which the trains of the Columbus, Sandusky & Hocking Railroad Company enter, and that said railroad and its predecessors have used said terminal facilities for the period of eight years.

Affiant further says that the contracts and leases between said The Union Depot Company and the respective railroads entering into and using said depot are in possession of affiant.

Affiant futher says that on or about the 12th day of April, 1893, The Columbus, Shawnee & Hocking Railway Company, of which contract or lease a copy is hereto attached, marked

Exhibit A, and made a part hereof, with the signature of said The Columbus, Shawnee & Hocking Railway Company thereto; that the said Exhibit A is a true copy carefully compared by affiant with the original lease or contract between said The Union Depot Company and The Columbus, Shawnee & Hocking Railway Company in affiant's possession.

Affiant further says that on or about said 12th day of
313 April, 1893, The Sandusky & Columbus Short Line Railway Company made and entered into a contract or lease with the said The Union Depot Company, a copy of which contract or lease is hereto attached, marked Exhibit B, and made a part hereof, and with the signature of the said The Sandusky & Columbus Short Line Railway Company thereto; that said Exhibit B is a true copy, carefully compared by affiant with the original lease and contract between said The Union Depot Company and said The Sandusky & Columbus Short Line Railway Company in affiant's possession.

Affiant further says that the said contracts or leases made and entered into by the said The Union Depot Company and the said The Columbus, Shawnee & Hocking Railway Company and The Sandusky & Columbus Short Line Railway Company are the contracts and leases in force and effect between The Columbus, Sandusky & Hocking Railroad Company and the said The Union Depot Company between the 1st day of June, 1896, and the first day of June, 1897, and that under and by the terms of said contracts the said The Columbus, Sandusky & Hocking Railroad Company was entitled to and did use said depot and terminal facilities between the said dates; that The Columbus, Sandusky & Hocking Railroad Company is the successor of the said The Sandusky & Columbus Short Line Railway Company and of the Columbus, Shawnee & Hocking Railway Company, and used the said depot and terminal facilities in the city of Columbus between said 1st day of June, 1896, and said 1st day of June, 1897, under and by virtue of said contracts.

Affiant further says that between the 1st day of June, 1896, and the 1st day of June, 1897, the said The Columbus, Sandusky & Hocking Railroad Company paid to said Union Depot Company under said contracts, and to entitle said The Columbus, Sandusky & Hocking Railroad Company to continue to use said depot and terminal facilities the sum of seven thousand three hundred and eighty-one and 24-100 dollars ($7,381.24); that said amount was paid upon the dates and in the sums as follows:

| | |
|---|---|
| June 25, 1896 | $690.51 |
| July 23, 1896 | 875.01 |
| August 25, 1896 | 479.35 |
| Sept. 25, 1896 | 505.04 |

| | | |
|---|---|---|
| | Oct. 24, 1896 | 634.31 |
| | Nov. 28, 1896 | 396.72 |
| 314 | Dec. 24, 1896 | 404.52 |
| | Jan. 25, 1897 | 467.03 |
| | Jan. 29, 1897 | 74.15 |
| | Feb. 25, 1897 | 630.63 |
| | March 24, 1897 | 665.87 |
| | April 23, 1897 | 822.79 |

Affiant further says that for the month of May, 1897, under said contract, the said The Columbus, Sandusky and Hocking Railroad Company was charged for the use of said depot and terminal facilities in the sum of $609.30, and that on the 25th day of June, 1897, the said The Union Depot Company received from and credited to the said The Columbus, Sandusky & Hocking Railroad Company the additional sum of $609.30 for the use of said depot and terminal facilities for said month of May, 1897.

Affiant further says that included in the said payments made by the said The Columbus, Sandusky & Hocking Railroad Company, are the proportionate amounts charged and assessed against said railroad company of the liabilities and expenses incurred by said Union Depot Company in connection with the construction of the High Street viaduct.

CASSIUS C. CORNER.

Sworn to before me and subscribed in my presence by the said Cassius C. Corner this 3rd day of January, A. D. 1902.

[SEAL.] H. M. McCORD,
*Notary Public Franklin County, Ohio.*

## Exhibit A.

Agreement and grant made this 12th day of April, A. D. one thousand eight hundred and ninety-three, between the Union Depot Company, a corporation owning the depot at Columbus, Ohio, commonly called the Union Depot, and the real estate hereinafter described, party of the first part, and The Columbus, Shawnee & Hocking Railway Company, a corporation and railroad company, party hereto of the second part.

Witnesseth: Whereas, the said Union Depot Company has purchased real estate and constructed a passenger depot for the accommodation and use of lines of railroad terminating in and passing through the City of Columbus.

315 Now, the said Union Depot Company, in consideration of the rentals and dues to be paid by, and the covenants

herein of the party of the second part, doth hereby grant to the party of the second part and its successors, for the term of ninety-nine (99) years from the 12th day of April, A. D. one thousand eight hundred and ninety-three (1893) and renewable on like terms forever, the use and enjoyment of the passenger depot and depot grounds, with their appurtenances as hereinafter mentioned, in common with other corporations owning and operating railroad lines terminating at and passing through Columbus, that may now or hereinafter apply for and be granted like use and enjoyment of the same, to-wit:

Beginning at an iron monument marked "U. D. C. A.," which said monument is distant from the corner of High and Naghten Streets six hundred and seven and eight-hundredths (607.08) feet, with a bearing of north ten (10) degrees, seven (7) minutes west; thence with a bearing of south ten (10) degrees, seven (7) min. east, to an iron monument marked "U. D. Co. B.", with a distance of four hundred and seventy and twenty-eighth-hundredths (470.28) feet; thence north from said monument fifty-one (51) degrees, fifty-three (53) minutes east, to an iron monument marked "U. D. Co. C.", with a distance of three hundred and ninety-eight and seventeen-hundredths (398.17) feet; thence north six (6) degrees, fifty-three (53) minutes east, to an iron monument marked "U. D. Co. D.", with a distance of sixty-two and twenty-two-hundredths (62.22) feet; thence north fifty-one (51) degrees, fifty-three (53) minutes east to a stake, with a distance of four hundred and ninety-six and seven- -three-hundredths (476.73) feet; thence north nineteen (19) degrees, thirty-four (34) minutes east, to an iron monument, numbered twenty-three (23), with a distance of thirty-four and three-hundredths (34.03) feet; thence north twenty-three (23) degrees, one (1) minute east, to an iron monument, number twenty-four (24), with a distance of one hundred and thirty-two and nineteen-hundredths (132.19) feet; this distance and bearing is the chord of a curve whose radius is one thousand and nine (1009) feet. Thence north one (1) degree, forty-nine (49) minutes east, to an iron monument number ten (10), with a distance of thirty-nine and forty-six one-hundredths (39.46) feet; thence north 27 degrees 17 minutes east to an iron monument number twenty-five (25) with a distance of seventy-four and three one-hundredths (74.03) feet; thence
316 north 40 degrees 55 minutes east, with a distance of two hundred and thirteen and six-tenths (213.6) feet; thence north 49 degrees 55 minutes west to an iron monument marked "U. D. Co. G.", with a distance of eighty-two and five-tenths (82.5) feet; thence south 40 degrees 55 minutes west to an iron monument number four (4), with a distance of one hundred and sixty-two and six one-hundredths (162.06) feet; thence

north 88 degrees 44 minutes west, with a distance of seventy-six and four one hundredths (76.04) feet; thence south 56 degrees 26 minutes west, to an iron monument marked "U. D. Co. H.", with a distance of one hundred and nine and forty-one one-hundredths (109.41) feet; thence south 51 degrees 53 minutes west, to an iron monument marked "U. D. Co. I.", with a distance of six hundred (600) feet; thence south 71 degrees 48 minutes west, to an iron monument marked "U. D. Co., A.", the point of beginning, and with a distance of two hundred and thirty-five and forty-eight one-hundredths (235.48) feet, containing seven (7) acres and eight hundred and twenty-one one-thousandths (.831) of an acre.

Also beginning at an iron monument number four (4) (which said monument is eleven hundred and fourteen (1114) feet distant from the corner of Naghten Street and Depot Alley, with a bearing north 1 degree 46 minutes east); thence north 40 degrees 55 minutes east, to an iron monument marked "U. D. Co. G.", with a distance of one hundred and sixty-two and six one-hundredths (162.06) feet; thence south 56 degrees 26 minutes west, with a distance of two hundred and eighteen and forty-one one-hundredths (218.41) feet; thence south 88 degrees 44 minutes east, to an iron monument, number four (4), the point of beginning, with a distance of seventy-six and four one-hundredths (76.04) feet, containing one hundred and eight one-thousandths (.108) of an acre, being a strip of land off the south end of eight and seventy-three one-hundredths (8.73) acres conveyed to the C. C. & C. and C. & X. Railroad Companies by George A. B. Lazelle and others by deed dated April 15, 1864.

Also beginning at an iron monument marked "U. D. Co. E.", thence north 26 degrees 7 minutes east, to an iron monument marked "U. D. Co. F.", with a distance of three hundred and eighty-four and three-tenths (384.3) feet; (monument F is on the original right of way line of the C. C. & C. R. R.); thence north 49 degrees 5 minutes west, to a stake, with a distance of seventeen and fifty one-hundredths (17.50) feet; thence
317 south 40 degrees 55 minutes west, to an iron monument, number twenty-five (25) with a distance of two hundred and thirteen and six-tenths (213.6) feet; thence south 27 degrees 17 minutes west, to an iron monument, number ten (10), with a distance of seventy-four and three one-hundredths (74.03) feet; thence south 1 degree 49 minutes west, to an iron monument, number twenty-four (24) (iron monument number twenty-four (24) on plat is distant from monument number eleven (11) corner of Depot Alley and Naghten Street in the City of Columbus, nine hundred and sixteen and fifty one-hundredths (916.50) feet, with a bearing north 1 degree 46 minutes east)

with a distance of thirty-nine and forty-six one-hundredths (39.46) feet. Thence a curve with a radius of one thousand and nine (1009) feet, whose chord has a bearing of south 23 degrees 1 minute west, with a distance of one hundred and thirty-two and nineteen one-hundredths (132.19) feet, to an iron monument, number twenty-three (23); thence south 19 degrees 34 minutes west, to a stake, with a distance of thirty-four and three one-hundredths (34.03) feet; thence north 51 degrees 53 minutes east, to an iron monument marked "U. D. Co. E.", with a distance of one hundred and three and twenty-seven one-hundredths (103.27) feet, and to the point of beginning, containing five hundred and thirty-five one-thousandths (.535) of an acre.

SECTION 2. The Union Depot Company hereby covenants and agrees with the party of the second part, to assign to it from time to time, a suitable track or tracks on said depot grounds connecting with the track or tracks into said Union Depot for the passenger trains operated by said second party; it being understood and agreed that The Union Depot Company, or the superintendent of said depot and depot grounds, may from time to time establish such reasonable rules as will keep open and free for use the said tracks; and the second party hereby covenants and agrees to comply with said rules and regulations.

SECTION 3. The Union Depot Company hereby covenants with the second party that no discrimination shall be made in favor of any other company using said depot, depot grounds or appurtenances, to the prejudice of the use and accommodation of the second party, it being understood that in the use of said property by the second party it shall with other companies now or hereafter using the same, have under said rules and regulations, equal facilities and accommodations in proportion to its business; and the business of each done in said passen-
318 ger depot and upon said depot grounds shall receive like attention, care and accommodation from the officers, agents and employes of the Union Depot Company, and each company using said depot and depot grounds shall be amenable to like control and treatment. Nothing herein contained shall prevent the Union Depot Company from assigning for use to the second party or other company a track or tracks also assigned to and used by other companies, or a track or tracks crossed by other tracks when from position, connection, lack of track room or other reasonable causes, it is proper to do so.

SECTION 4. No company other than the Union Depot Company shall be permitted to place upon said depot grounds its track or other fixture or building, without consent first obtained from the Board of Directors of the Union Depot Company, and if such consent be given, the terms and contract for the rental shall be reduced to writing, signed and executed by the proper

parties before the same shall be valid, or of any binding force whatever upon the Union Depot Company. If such contract is made for freight tracks or tracks other than passenger depot tracks, the same shall be constructed, maintained and supervised by and at the expense of the company or companies obtaining a grant for the use of the ground therefor; and the rent shall be at the rate of eight per centum per annum upon the value of the ground needed for said track or tracks and their convenient use; and all rentals reserved under this section shall be payable monthly, and applied, when collected to reduce the aggregate monthly expenses chargeable to the companies using said Union Depot.

SECTION 5. The Union Depot Company shall keep the passenger train tracks upon said depot grounds and in said depot, with their appendages, in good order, provide the depot with all the usual supplies, furniture and appendages for a depot and the convenient use of the same, keep the same in good repair, and provide a reasonable number of ticket, baggage and other agents and employes to conduct and manage the business incident thereto.

SECTION 6. It is understood and agreed that the said Union Depot Company shall have the general control, management and supervision of said depot and depot grounds, the location of the tracks therein and thereon, the control and direction of the use of the said tracks and passenger depot and depot grounds, and the appointment and supervision of all officers, agents and employes necessary to the management and
319 conducting of the business of the same in said depot and on said depot grounds; but on complaint in writing, made in good faith, by the Superintendent of the railroad of the party of the second part, that any one or more of the officers, agents or employes aforesaid do not perform his or their duties in a manner satisfactory to the second party or is not trustworthy, the Union Depot Company shall, without requiring other or specific charges, remove or discharge such officer, agent or employe, from its service. It shall be presumed that such request was made in good faith, but the Union Depot Company may, within ten days after receiving such request, refer to arbitrators under the seventeenth section of these articles, the question whether such request was made in good faith, that is, because the Superintendent who made it was in fact dissatisfied with the mode in which such officer, agent or employe of the Depot Company performed his duties, or was under the impression of belief that such officer, agent or employe is in fact not trustworthy; and in case the said Union Depot Company shall not within thirty days after such request, in writing, made in good faith, or within ten days afterward that said request was

made in good faith, discharge such designated officer, agent or employe, it shall be deemed and taken and operate after the expiration of said thirty days, or said ten days, as the case may be, as an extension of the time for the paymest of the proportion of monthly dues of the second party in the premises, then current or thereafter accruing, and the same thereafter shall not be due until such officer, agent, or employe is discharged, and in case such officer, agent or employe is not discharged within six months after said request made in good faith, the second party may, at its option, terminate and put an end to this agreement by notice thereof in writing to the Union Depot Company, and thereupon this agreement and grant shall terminate without other act by either party; and in case this agreement is so terminated, the damages, if any, sustained by the second party by reason of the termination of the same, shall be due and payable to the second party, and recoverable by award under the seventeenth section of this agreement; and the rental herein provided for, without interest, up to the time of the termination of his agreement, shall be a matter of adjustment by the arbitrators as they deem just.

SECTION 7. Inasmuch as the officers, agents and em-
320 ployes of the Union Depot Company are in fact employed for and in furtherance of the business of the companies using the property of the Union Depot Company, and the Depot Company derives no actual profits therefrom, except interest on its investment, it is understood and agreed between the parties hereto, that the Union Depot Company shall not be liable or responsible, in any manner whatsoever, as master or otherwise, to the second party, for the fault or neglect of the officers, agents or employes of the Union Depot Company, or for any damages to the second party resulting from the acts of omission or commission of said officers, agents or employes; and the second party hereby agrees to save and indemnify the Union Depot Company against any damages, costs or expenses growing out of any claim for damages, injuries or otherwise, to persons or property done or caused by engines or cars of the second party, or by fault or neglect of the officers, agents or employes of the Union Depot Company, while acting for or in furtherance of the business of the second party, or while acting as the mutual servant of both parties. Nothing, however, herein contained shall exonerate said officers, agents or employes from personal liability for any fault or neglect of duty.

SECTION 8. And whereas the basis of the aggregate amount of the rental and dues to be paid by the companies operating lines of railroad, and using said passenger depot and the connecting tracks thereto over said depot grounds in common, is made up as follows:

First. Eight per cent. per annum or seventy-four thousand five hundred and ninety-seven dollars and fifty cents, being the capital stock of the Union Depot Company.

Second. The annual interest at seven per cent. gold, payable semi-annually, on the Mortgage Bonds of the Union Depot Company, issued or hereafter issued under the restrictions of the resolutions of the Board of Directors of said company, authorizing said issue, and recited in its mortgage or trust deed, securing the payment of said bonds.

Third. Six hundred and seventy-five dollars per annum as a sinking fund to retire said Union Depot bonds.

Fourth. The current expenses of keeping up, maintaining, repairing, insuring, furnishing and supervising said passenger depot and depot grounds, their appendages and appurtenances, and such other liabilities and expenses as said depot company may incur as a corporation and union depot company, and also as bailor, lessor or grantor of the premises and other-
321 wise in maintaining, operating and managing said property together with the taxes and assessments upon the same.

Provided however, that from the said aggregate amount above mentioned, there shall be deducted:

All rents, issues and profits collected by the Union Depot Company from persons or companies for the use of grounds for freight tracks, for the use of dining rooms, express rooms, restaurants, news rooms, and for stands or other room or rooms occupied or used by other than the officers, agents and employes of the Union Depot Company.

Now it is understood between the parties hereto, that the said aggregate amount after making the deductions hereinbefore stated, shall constitute the amount of the annual rental and dues to be paid by the companies operating lines of railroad and passenger trains into and from said Union Depot, and for the use of the track or tracks for passenger trains on said Depot grounds, and the common use of the said depot and said amount of rental and dues incurred each month, shall be apportioned among the said companies monthly, and in proportion to the number of passenger trains operated by each company, which shall "en route" to and from their destinations, enter upon and depart from said depot grounds during the same month.

Provided, however, that the said portion of the semi-annual interest on the mortgage bonds, the amount of the sinking fund, the annual dues on the capital stock of the Union Depot Company, and the semi-annual taxes, shall be apportioned and carried into the said account in the month preceding that in which the same becomes due; and the basis of the apportionment of each of said items last mentioned shall be on the aforesaid num-

ber of passenger trains entering and departing from said depot and depot grounds, during the six months preceding the month in which the account last mentioned is to be made out. But if such apportionment is to be made before this agreement has been in operation for six months then the first apportionments shall be made on the number of said trains from the time this agreement goes into effect to the time of such apportionment.

SECTION 9. The party of the second part hereby covenants with the Union Depot Company to render to it, on the first business day of each month, a statement of the number of passenger trains operated by it and arriving "en route" to and departing "en route" from said depot and depot grounds.

322 The said statement shall be subject to revision by the proper officer of the Union Depot Company, and such revision shall be deemed *prima facie* correct and made the basis of adjustment; and after payments made on that basis may be readjusted by reference to arbitration under the 17th section of these articles.

SECTION 10. The party of the second part and its successors doth hereby covenant with the Union Depot Company and its successors to pay monthly at the office of the Union Depot Company at Columbus, for the use of said depot building and the passenger tracks connecting therewith, its said proportions of said rental and dues herein above mentioned, within ten days after the account thereof is forwarded or delivered to the auditor, or other proper officer of the second party.

SECTION 11. If the second party shall make default for the period of ninety days in the payment of its said monthly rental or dues, the Union Depot Company may at its option, and at any time thereafter (said default still continuing), terminate this agreement by notice in writing to that effect, signed by the President of the depot company, and upon service of such notice upon the president, superintendent or other executive officer of the second party, who derives his appointment from the Board of Directors of the second party, this agreement shall terminate without other act of the Union Depot Company.

SECTION 12. In case default be made for the period of sixty days by any other company than the second party, in the payment of its proportion of the said rental and dues, the Union Depot Company, may apportion, under the provisions aforesaid, the amount so in default, and charge the same to the party of the second and the other companies not in default, in said monthly account, as part of the rental and dues owing by them; and the second party hereby agrees to pay its proportion of the same. On such payment the second party shall, to the amount, be subrogated to the rights and claims of the Union Depot Company as against such defaulting company.

SECTION 13. Railroads now entering at or near the Union depot, and any railroads hereafter desiring to use said Union depot, and depot grounds, shall be entitled to like privileges and facilities, with like liabilities as those herein provided, and the rental and dues of the second party shall be equitably adjusted and apportioned accordingly among those now or hereafter using said depot and depot grounds.

323 SECTION 14. The books, files and accounts of the Union Depot Company shall be open to the inspection of the president and superintendent, manager of the railroad of the second party, or such officer as it may appoint for such purpose; and the statement, accounts and reports of the second party in respect to its passenger trains shall be open to the inspection of the president and superintendent of the Union Depot Company or such other officer of the depot company as its board may appoint for that purpose.

SECTION 15. The rule of the apportionment of the rental and dues to the number of passenger trains as provided in the second paragraph of the 8th section of these articles, and any other rule of apportionment hereafter adopted, may each or any of them at the expiration of every five years from the date of these articles be reconsidered, if either party hereto demand it of the other in writings. If the parties cannot agree in the readjustment of the matter it may be referred to referees as provided in the 17th section of this agreement. If any change or alteration is made in the premises, other companies using said depot and depot grounds under like articles may, at their option, adopt such change or alteration by notice in writing to the Union Depot Company within thirty days after such change or alteration is made; provided, however, no alteration or change shall be made which shall affect or impair the provisions of the first paragraph of the 8th section of these articles, fixing the basis and aggregate amount of the rental and dues.

SECTION 16. It is hereby understood and agreed, anything in these presents to the contrary notwithstanding, that railroad companies under this or a like agreement, operating a leased line into or through said depot or depot grounds, shall, upon the termination of such lease and possession of the leased lines delivered to the lessor, receiver or other successors of the lessor, be discharged thereafter from all liabilities and covenants contained in this or like agreement in respect to such leased line, and all rights, grants and privileges under this or like agreement in respect to such leased lines, shall also thereafter terminate and cease.

SECTION 17. If any difference shall arise between the parties hereto, in any manner relating to the construction of this agreement, or growing out of the rights or duties of the respective

parties thereunder, or the performance of the terms thereof, each shall select a disinterested referee of experience and skill in railway management, and the said referees shall select
324 another of like skill and experience, and the three so chosen shall promptly hear and determine such differences, and their decision, or majority of them, shall be final and conclusive upon the parties. And if either of the parties fail to appoint a referee as aforesaid, for a period of ten days after written notice to make such appointment, then and in that event, the referee appointed by the party not in default shall appoint the referee for the defaulting party, and the said two referees shall then select a third referee as aforesaid.

The parties mutually covenant with each other to keep and perform, on their respective parts, whatsoever shall be required on their parts by such award.

These articles and grant shall operate and take effect on and after the 12th day of April, one thousand eight hundred and ninety-three.

In witness whereof the parties have by their respective presidents signed and annexed the seals of their respective corporations hereto.

THE UNION DEPOT COMPANY,
By JAMES McCREA, *President.*
THE COLUMBUS, SHAWNEE & HOCKING RAILWAY COMPANY,
By F. J. PICARD, *Vice-Pres.*

Attest:
W. E. GUERIN, *Sec.*

Signed and acknowledged before us:
H. B. HUTCHINSON,
E. L. McCUNE.

STATE OF PENNSYLVANIA, } *ss*:
*County of Alleghany,* }

Before me, a notary public for the State of Pennsylvania, in and for said county, personally appeared the Union Depot Company, by James McCrea, president of said company, who acknowledged the signing of the above instrument and the ensealing of the same to be the voluntary act and deed of said company, and the voluntary act and deed of said James McCrea as president of said company.

In witness whereof, I have hereunto set my hand and notarial seal this 29th day of October, A. D. 1893.

I. M. McKIBBON, *Notary Public.*

STATE OF OHIO, *Franklin County,* } ss:

Before me, a notary public for the State of Ohio, and in and for said county personally appeared The Columbus, Shawnee & Hocking Railroad Company, by F. J. Picard, president of said company, who acknowledged the signing of the above
325 instrument and the enscaling of the same to be the voluntary act and deed of said company, and the voluntary act and deed of said F. J. Picard, as president of said company.

In witness whereof, I have hereunto set my hand and notarial seal this 12th day of April, A. D. 1893.

C. L. LEPERT, *Notary Public.*

EXHIBIT B.

Agreement and grant made this 12th day of April, A. D. one thousand eight hundred and ninety three, between the Union Depot Company, a corporation owning the depot at Columbus, Ohio, commonly called the Union Depot, and the real estate hereinafter described, party of the first part, and The Sandusky & Columbus Shortline Railway Company, a corporation and railroad company, party hereto of the second part.

Witnesseth: Whereas, the said Union Depot Company has purchased real estate and constructed a passenger depot for the accommodation and use of lines of railroad terminating in and passing through the city of Columbus.

Now, the said Union Depot Company, in consideration of the rentals and dues to be paid by, and the covenants herein of the party of the second part, doth hereby grant to the party of the second part, and its successors, for the term of ninety-nine (99) years from the 12th day of April, A. D. one thousand eight hundred and ninety three (1893) and renewable on like terms forever, for the use and enjoyment of the passenger depot and depot grounds, with their appurtenances as hereinafter mentioned, in common with other corporations owning and operating railroad lines terminating at and passing through Columbus, that may now or hereinafter apply for and be granted like use and enjoyment of the same, to-wit:

Beginning at an iron monument marked "U. D. Co. A.", which said monument is distant from the corner of High and Naghten Streets six hundred and seven and eight hundred hundredths (607.98) feet, with a bearing of north ten (10) degrees, seven (7) minutes west; thence with a bearing of south ten (10) degrees, seven (7) minutes east, to an iron monument marked "U.

D. Co. B.", with a distance of four hundred and seventy and twenty-eight hundredths (470.28) feet; thence north
326 from said monument fifty-one (51) degrees, fifty-three (53) minutes east, to an iron monument marked "U. D. Co. C." with a distance of three hundred and ninety-eight and seventeen hundredths (398.17) feet; thence north six (6) degrees, fifty-three (53) minutes east, to an iron monument marked "U. D. Co. D.", with a distance of sixty-two and twenty-two hundredths (62.22) feet; thence north fifty-one (51) degrees, fifty-three (53) minutes east to a stake, with a distance of four hundred and ninety-six and seventy-three hundredths (496.73) feet; thence north nineteen (19) degrees, thirty-four (34) minutes east, to an iron monument, numbered twenty-three (23), with a distance of thirty-four and three hundredths (34.03) feet; thence north twenty-three (23) degrees, one (1) minute east, to an iron monument, number twenty-four (24), with a distance of one hundred and thirty-two and nineteen hundredths (132.19) feet; this distance and bearing is the chord of a curve whose radius is one thousand and nine (1009) feet. Thence north one (1) degree, forty-nine (49) minutes east, to an iron monument number ten (10), with a distance of thirty-nine and forty-six one-hundredths, (39.46) feet; thence north 27° 17′ east to an iron monument twenty-five (25) with a distance of seventy-four and three one-hundredths (74.03) feet; thence north 40° 55′ east, with a distance of two hundred and thirteen and six tenths (213.6) feet; thence north 49° 55′ west, to an iron monument marked "U. D. Co. G.", with a distance of eighty-two and five tenths (82.5) feet; thence south 40° 55′ west to an iron monument number four (4) with a distance of one hundred and sixty-two and six one-hundredths (162.06) feet; thence north 88° 44′ west, with a distance of seventy-six and four one-hundredths (76.04) feet; thence south 56° 26′ west, to an iron monument marked "U. D. Co. H.", with a distance of one hundred and nine and forty-one one hundredths (109.41) feet; thence south 51° 53′ west, to an iron monument marked "U. D. Co. I." with a distance of six hundred (600) feet; thence south 71° 48′ west, to an iron monument marked "U. D. Co. A.", the point of beginning, and with a distance of two hundred and thirty-five and forty-eight one-hundredths (235.48) feet, containing seven (7) acres and eight hundred and twenty-one one-thusandths (.821) of an acre.

Also beginning at an iron monument number four (4) (which said monument is eleven hundred and fourteen (1114) feet distant from the corner of Naghten street and Depot alley, with a bearing north 1° 46′ east); thence north 40° 55′ east, to an
327 iron monument marked "U. D. Co. G.", with a distance of one hundred and sixty-two and six one-hundredths

(162.06) feet; thence south 56° 26′ west, with a distance of two hundred and eighteen and forty-one one-hundredths (218.41) feet; thence south 88° 44′ east, to an iron monument, number four (4) the point of beginning, with a distance of seventy-six and four one-hundredths (76.04) feet, containing one hundred and eight one-thousandths (.108) of an acre, being a strip of land off of the south end of eight and seventy-three one-hundredths (8.73) acres conveyed to the C. C. & C. and C. & X. Railroad Companies by George A. B. Lazelle and others by deed dated April 15, 1864.

Also beginning at an iron monument marked "U. D. Co. E.", thence north 26° 7′ east, to an iron monument marked "U. D. Co. F.", with a distance of three hundred and eighty-four and three-tenths (384.3) feet; (monument F is on the original right of way line of the C. C. & C. R. R.); thence north 49° 5′ west, to a stake, with a distance of seventeen and fifty one-hundredths (17.50) feet; thence south 40° 55′ west, to an iron monument, number twenty-five (25) with a distance of two hundred and thirteen and six-tenths (213.6) feet; thence south 27° 17′ west, to an iron monument, number ten (10) with a distance of seventy-four and three one-hundredths (74.03) feet; thence south 1° 49′ west, to an iron monument, number twenty-four (24); (iron monument number twenty-four (24) on plat is distant from monument number eleven (11) corner of Depot alley and Naghten street in the city of Columbus, nine hundred and sixteen and fifty-one hundredths (916.50) feet, with a bearing north 1° 46′ east) with a distance of thirty-nine and forty-six one-hundredths (39.46) feet. Thence a curve with a radius of one thousand and nine (1009) feet, whose chord has a bearing of south 23° 1′ west, with a distance of one hundred and thirty-two and nineteen one-hundredths (132.19) feet, to an iron monument, number twenty-three (23); thence south 19° 34′ west, to a stake, with a distance of thirty-four and three one-hundredths (34.03) feet; thence north 51° 53′ east to an iron monument marked "U. D. Co. E.", with a distance of one hundred and three and twenty-seven one-hundredths (103.27) feet, and to the point of the beginning, containing five hundred and thirty-five one-thousandths (.535) of an acre.

SECTION 2. The Union Depot Company hereby covenants and agrees with the party of the second part, to assign to it
328 from time to time, a suitable track or tracks on said depot grounds connecting with the track or tracks into said Union Depot for the passenger trains operated by said second party; it being understood and agreed that The Union Depot Company, or the superintendent of said depot and depot grounds, may from time to time establish such reasonable rules as will keep open and free for use the said tracks; and the

second party hereby covenants and agrees to comply with said rules and regulations.

SECTION 3. The Union Depot Company hereby covenants with the second party that no discrimination shall be made in favor of any other company using said depot, depot grounds or appurtenances, to the prejudice of the use and accommodation of the second party, it being understood that in the use of said property by the second party it shall with other companies now or hereafter using the same, have under said rules and regulations, equal facilities and accommodations in proportion to its business; and the business of each done in said passenger depot and upon said depot grounds, shall receive like attention, care and accommodation from the officers, agents and employes of the Union Depot Company, and each company using said depot and depot grounds shall be amenable to like control and treatment. Nothing herein contained shall prevent the Union Depot Company from assigning for use to the second party or other company a track or tracks also assigned to and used by other companies, or a track or tracks crossed by other tracks when from position, connection, lack of track room or other reasonable causes, it is proper to do so.

SECTION 4. No company other than the Union Depot Company shall be permitted to place upon said depot grounds its track or other fixture or building, without consent first obtained from the Board of Directors of the Union Depot Company, and if such consent be given, the terms and contract for the rental shall be reduced to writing, signed and executed by the proper parties before the same shall be valid, or of any binding force whatever upon the Union Depot Company. If such contract is made for freight track or tracks other than passenger depot tracks, the same shall be constructed, maintained and supervised by and at the expense of the company or companies obtaining a grant for the use of the ground therefor; and the rent shall be at the rate of eight per centum per annum upon the value of the ground needed for said track or tracks and their convenient use; and all rentals re-
329 served under this section shall be payable monthly, and applied, when collected to reduce the aggregate monthly expenses chargeable to the companies using said Union Depot.

SECTION 5. The Union Depot Company shall keep the passenger train tracks upon said depot grounds and in said Union Depot, with their appendages, in good order, provide the depot with all the usual supplies, furniture and appendages for a depot and the convenient use of the same, keep the same in good repair, and provide a reasonable number of tickets, baggage and other agents and employes and manage the business incident thereto.

SECTION 6. It is understood and agreed that the said Union Depot Company shall have the general control, management and supervision of said depot and depot grounds; the location of the tracks therein and thereon, the control and direction of the use of the said tracks and passenger depot and depot grounds, and the appointment and supervision of all officers, agents and employes necessary to the management and conducting of the business of the same in said depot and on said depot grounds; but on complaint in writing, made in good faith, by the superintendent of the railroad of the party of the second part, that any one or more of the officers, agents or employes aforesaid do not perform his or their duties in a manner satisfactory to the second party or is not trustworthy, the Union Depot Company shall, without requiring other or specific charges, remove or discharge such officer, agent or employe, from its service. It shall be presumed that such request was made in good faith, but the Union Depot Company may, within ten days after receiving such request, refer to arbitrators under the seventeenth section of these articles, the question whether such request was made in good faith, that is, because the superintendent who made it was in fact dissatisfied with the mode in which such officer, agent or employe of the Depot Company performed his duties, or was under the impression or belief that such officer, agent or employe is in fact not trustworthy; and in case the said Union Depot Company shall not within thirty days after such request, in writing, made in good faith, or within ten days after award that said request was made in good faith, discharge such designated officer, agent or employe, it shall be deemed and taken and operate after the expiration of said thirty days, or said ten days, as the case may be, as an extension of the time for the payment of the proportion
330 of monthly dues of the second party in the premises, then current and thereafter accruing, and the same thereafter shall not be due until such officer, agent or employe is discharged, and in case such officer, agent or employe is not discharged within six months after said request made in good faith, the second party may, at its option, terminate and put an end to this agreement by notice thereof in writing to the Union Depot Company, and thereupon this agreement and grant shall terminate without other act by either party; and in case this agreement is so terminated, the damages, if any, sustained by the second party by reason of the termination of the same, shall be due and payable to the second party, and recoverable by award under the seventeenth section of this agreement; and the rental herein provided for, without interest, up to the time of the termination of this agreement, shall be a matter of adjustment by the arbitrators as they deem just.

SECTION 7. Inasmuch as the officers, agents and employes of the Union Depot Company are in fact employed for and in furtherannce of the business of the companies using the property of the Union Depot Company, and the Depot Company derives no actual profits therefrom, except interest on its investment, it is understood and agreed between the parties hereto, that the Union Depot Company shall not be liable or responsible, in any manner whatsoever, as master or otherwise, to the second party, for the fault or neglect of the officers, agents or employes of the Union Depot Company, or for any damages to the second party resulting from the act of omission or commission of said officers, agents or employes, and the second party hereby agrees to save and indemnify the Union Depot Company against any damages, costs or expenses growing out of any claim for damages, injuries or otherwise, to persons or property done or caused by engines or cars of the second party, or by the fault or neglect of the officers, agents or employes of the Union Depot Company, while acting for or in furtherance of the business of the second party, or while acting as the mutual servant of both parties. Nothing, however, herein contained shall exonerate said officers, agents or employes from personal liability for any fault or neglect of duty.

SECTION 8. And whereas, the basis of the aggregate amount of the rental and dues to be paid by the companies operating lines of railroad, and using said passenger depot and the connecting tracks thereto over said depot grounds in common, is made up as follows:

331 First. Eight per cent per annum on seventy-four thousand, five hundred and ninety-seven dollars and fifty cents, being the capital stock of the Union Depot Company.

Second. The annual interest at seven per cent gold, payable semi-annually, on the Mortgage Bonds of the Union Depot Company, issued or hereafter issued under the restrictions of the resolutions of the Board of Directors of said Company, authorizing said issue, and recited in its mortgage or trust deed, securing the payment of said bonds.

Third. Six hundred and seventy-five dollars per annum as a sinking fund to retire said Union Depot bonds.

Fourth. The current expenses of keeping up, maintaining, repairing, insuring, furnishing and supervising said passenger depot and depot grounds, their appendages and appurtenances, and such other liabilities and expenses as said depot company incur as a corporation and union depot company, and also a bailor, lessor or grantor of the premises and otherwise in maintaining, operating and managing said property together with the taxes and assessments upon the same.

Provided, however, that from the said aggregate amount above mentioned, there shall be deducted:

All rents, issues and profits collected by the Union Depot Company from persons or companies for the use of grounds for freight tracks, for the use of dining rooms, express rooms, restaurants; news rooms and for stands or other room or rooms occupied or used by other than the officers, agents and employes of the Union Depot Company.

Now it is understood between the parties hereto, that the said aggregate amount after making the deductions hereinbefore stated, shall constitute the amount of the annual rental and dues to be paid by the companies operating lines of railroad and passenger trains into and from said Union Depot, and for the use of the track or tracks for passenger trains on said Union Depot grounds and the common use of the said depot and said amount of rental dues and incurred each month, shall be apportioned among said companies monthly, and in proportion to the number of passenger trains operated by each company, which shall "en route" to and from their destination, enter upon and depart from said depot grounds during the same month.

Provided, however, that the said portion of the semi-annual interest on the mortgage bonds, the amount of
332 the sinking fund, the annual dues on the capital stock of the Union Depot Company, and the semi-annual taxes shall be apportioned and carried into the said account in the month preceding that in which the same becomes due; and the basis of the apportionment of each of said items last mentioned shall be on the aforesaid number of passenger trains entering and departing from said depot and depot grounds, during the six months preceding the month in which the account last mentioned is to be made out. But if such apportionment is to be made before this agreement has been in operation for six months then the first apportionment shall be made on the number of said trains from the time this agreement goes into effect to the time of such apportionment.

SECTION 9. The party of the second part hereby covenants with the Union Depot Company to render to it, on the first business day of each month, a statement of the number of passenger trains operated by it and arriving "en route" to the departing "en route" from said depot and depot grounds. The said statement shall be subject to revision by the proper officer of the Union Depot Company, and such revision shall be deemed *prima facie* correct and made the basis of adjustment; and after payments made on that basis may be readjusted by reference to arbitration under the 17th section of these articles.

SECTION 10. The party of the second part and its successors doth hereby covenant with the Union Depot Company and its successors to pay monthly at the office of the Union Depot

Company at Columbus, for the use of said depot building and the passenger tracks connecting therewith, its said proportions of said rental and dues herein above mentioned, within ten days after the account thereof is forwarded or delivered to the auditor, or other proper officer of the second party.

SECTION 11. If the second party shall make default for the period of ninety days in the payment of its said monthly rental or dues, the Union Depot Company may at its option, and at any time thereafter (said default still continuing), terminate this agreement by notice in writing to that effect, signed by the president of the depot company, and upon service of such notice upon the president, superintendent or other executive officer of the second party, who derives his appointment from the Board of Directors of the second party, this agreement shall terminate without other act of the Union Depot Company.

333 SECTION 12. In case default be made for a period of sixty days by any other company than the second party, in the payment of its proportion of the said rental and dues, the Union Depot Company may apportion, under the provisions aforesaid, the amount so in default, and charge the same to the party of the second part and the other companies not in default, in said monthly account, as a part of the rental and dues owing by them, and the second party hereby agrees to pay its proportion of the same. On such payment the second party shall, to the amount, be subrogated to the rights and claims of the Union Depot Company as against such defaulting company.

SECTION 13. Railroads now entering at or near the union depot, and any railroads hereafter desiring to use said union depot, and depot grounds, shall be entitled to like privileges and facilities, with like liabilities as those herein provided and the rental and dues of the second party shall be equitably readjusted and apportioned accordingly among those now or hereafter using said depot and depot grounds.

SECTION 14. The books, files and accounts of the Union Depot Company shall be open to the inspection of the President and Superintending Manager of the railroad of the second party, or suc- officer as it may appoint for such purposes; and the statement, accounts and reports of the second party in respect to its passenger trains shall be open to the inspection of the President and Superintendent of the Union Depot Company or such other officer of the depot company as its Board may appoint for the purpose.

SECTION 15. The rule of the apportionment of the rental and dues to the number of passenger trains as provided in the second paragraph of the 8th section of these articles, and any

other rule of apportionment hereafter adopted, may each or any of them at the expiration of every five years from the date of these articles be reconsidered, if either party hereto demand it of the other in writings. If the parties can not agree in the readjustment of the matter it may be referred to referees as provided in the 17th section of this agreement. If any change or alteration is made in the premises other companies using said depot and depot grounds under like articles may, at their option, adopt such change or alteration by notice in writing to the Union Depot Company within thirty days after such change or alteration is made; provided, however, no alteration or change shall be made which shall effect or impair the provisions of the first paragraph of the 8th section of these articles,
334 fixing the basis and aggregate amount of the rental and dues.

SECTION 16. It is hereby understood and agreed, anything in these presents to the company notwithstanding, that railroad company under this or a like agreement, operating a leased line into or through said depot or depot grounds, shall, upon the termination of such lease and possession of the leased lines delivered to the lessor, receiver or other successors of the lessor, be discharged thereafter from all liabilities and covenants contained in this or like agreement in respect to such leased line, and all rights, grants and privileges under this or like agreement in respect to such leases lined, shall also thereafter terminate and cease.

SECTION 17. If any difference shall arise between the parties hereto, in any manner relating to the construction of this agreement, or growing out of the rights or duties of the respective parties thereunder, for the performance of the terms thereof, each shall select a disinterested referee of experience and skill in railway management, and the said referees shall select another of like skill and experience, and the three so chosen shall promptly hear and determine such differences, and their decision, or majority of them, shall be final and conclusive upon the parties. And if either of the parties fail to appoint a referee as aforesaid, for a period of ten days after written notice to make such appointment, then and in that event, the referee appointed by the party not in default shall appoint the referee for the defaulting party, and the said two referees shall then select a third referee as aforesaid.

The parties mutually covenant with each other to keep and perform, on their respective parts, whatsoever shall be required on their parts by such award.

These articles and grant shall operate and take effect on and after the 12th day of April, one thousand eight hundred and ninety-three.

In witness whereof the parties have by their respective presidents signed and annexed the seals of their respective corporations hereto.

THE UNION DEPOT COMPANY,
By JAMES McCREE, *President.*

Attest:
W. E. GUERIN, *Sec.*

THE SANDUSKY & COLUMBUS SHORT LINE RAILWAY COMPANY,
By F. J. PICARD, *Vice-Pres.*

Signed and acknowledged before us:
H. B. HUTCHINSON,
E. L. McCUNE.

335 STATE OF PENNSYLVANIA, *County of Allegheny,* } *ss:*

Before me, a notary public, for the State of Pennsylvania, in and for said county, personally appeared the Union Depot Company by James McCree, President of said company, who acknowledged the signing of the above instrument and the ensealing of the same to be the voluntary act and deed of said company, and the voluntary act and deed of said James McCree, as president of said company.

In witness whereof, I have hereunto set my hand and notarial seal this 29th day of October, A. D., 1893.

I. M. McKIBBEN, *Notary Public.*

STATE OF OHIO, *Franklin County,* } *ss:*

Before me, a notary public, for the State of Ohio and in and for said county personally appeared The Sandusky & Columbus Short Line Railway Company, by F. J. Picard, President of said company, who acknowledged the signing of the above instrument and the ensealing of the same to be the voluntary act and deed of said company, and the voluntary act and deed of said F. J. Picard as president of said company.

In witness whereof, I have hereunto set my hand and notarial seal this 12th day of April, A. D., 1893.

C. L. LEPERT, *Notary Public.*

And afterwards, to wit, on the 20th day of March, A. D., 1901, the following Exceptions to Master's Report was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

336 *Exceptions to Master's Report.*

United States Circuit Court, Southern District of Ohio, Eastern District.

| | |
|---|---|
| METROPOLITAN TRUST CO., OF NEW YORK, Trustee, Complainant, *vs.* THE COLUMBUS, SANDUSKY & HOCKING R. R. Co., *et al.*, Defendants, | No. 887. In Equity. |
| MERCANTILE TRUST COMPANY, OF NEW YORK, AS Trustee, Complainant, *vs.* THE COLUMBUS, SANDUSKY & HOCKING R. R. Co., *et al.*, Defendants, | Consolidated Cause. |

*Exceptions to the special master's report.*

Winfried S. Gregg, intervening petitioner and claimant herein under the orders of the court heretofore made now comes and excepts to the Special Masters' Report filed herein on the 20th day of February, 1902, in this, to-wit:

1. To the finding and conclusion of said master that the burden of proof is upon the claimant to provide a diversion and also a non-restoration of current earnings.

2. To the finding and conclusion of the Master that the burden of proof is upon the claimant to show expenditures for the benefit of the bondholders frm current earnings and not from money derived from other sources or if paid originally from current earnings that such earnings were not made good by funds derived from such other sources.

3. To the finding by the Master of the amount of diversion within the six months and twelve months prior to the appointment of the receiver herein.

4. To the finding of the Master that the payment for car couplers within said periods was not a diversion.

5. To the finding of the Master that the payment of coupon notes within said periods was not a diversion.

6. To the finding of the Master that the payment of interest on Monsarrat certificates within said periods was not a diversion.

7. To the finding of the Master that the payment upon
337 the Union Depot Viaduct within said first period was only $442.42 and that the same in each of said periods was not a diversion.

8. To the findings and conclusion of the Master that there had been within the said periods covered by said report and the orders of the court, a complete restoration of any diversion from the current income of said Railroad within said periods.

9. To the finding of the Master that the proceeds from the sale of mileage books was a restoration and his failure to find that such proceeds were current earnings.

10. To the findings of the Master that the total diversion of current earnings during the six months' period for bondholders was $99,215.49, or in any event only $106,175.71.

11. To the finding of the Master that there was received during the so-called twelve months' period from sources other than current earnings, $310,493.79.

12. To the finding and conclusion of the Master that the payment for car couplers, Depot Viaduct account, interest on Monsarrat certificates and coupon notes were not a diversion and that the true diversions within said period of twelve months were only the sum of $196,863.24, or at the most $205,090.50.

13. To the findings and conclusions of the Master that in any event the funds received from sources other than current earnings during said twelve months amounted to the sum of $211,718.21.

14. To the conclusios of law of the Master that the payment from borrowed money or from funds derived from other sources than current earnings within both of said periods of pay rolls and debts and other current debts which were debts of the income, constituted a restoration of current earnings diverted for the benefit of mortgage bondholders.

15. To the conclusion of law of the Master that the payment from borrowed money or funds derived from sources other than current earnings of unsecured debts of the company which were not debts of the income constitute a restoration of current earnings diverted for the benefit of the bondholders.

16. That the findings of fact of the Master are contrary to the evidence and not sustained by the evidence.

17. That the conclusions of law of the Master are contrary to law.

18. For the failure of the Master to find that in order to

constitute a restoration of a diversion of current earn-
338 ings for the benefit of the bondholders it must appear that money borrowed by the company was in fact, or might have been used for the making of such payments as are claimed to have constituted the division.

19. For the failure of the Master to find that when money borrowed is shown to have been used for the payment of claims other than those which inured to the benefit of the bondholders no restoration has taken place.

20. To the finding of the Master that there has been a restoration of the diversion shown.

21. To said report in other respects as being not in accordance with the law and the evidence.

CLEVELAND & BOWLER,
*Solicitors for W. S. Gregg.*

And afterwards, to wit, on the 6th day of October, A. D., 1901, the following ruling of Judge A. C. Thompson, District Judge, was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Ruling of Judge Thompson.*

United States Circuit Court, Southern District of Ohio, Eastern District.

METROPOLITAN TRUST COMPANY,
*vs.*
THE C. S. & H. R. R. Co.

The deposit of the 800 bonds was required to secure the payment of claims against the railway company entitled to preference over the mortgage claims, that is, such claims as the State Court found that the Monsarrat certificates were entitled to such preference and appointed a Master to determine what other claims should have such preference. The Master never reported and this court is now called on to determine what claims, other than the Monsarrat certificates, are entitled to such preference. It is permissible to go beyond the Monsarrat certificates, which are the only claims found by the State Court to be entitled to preference over the mortgage claims and
339 classify the other claims, it must be done in conformity with the intention of the State Court as it may be gathered from its decree requiring the deposit of the bonds. Although there is some doubt as to the power or duty of this court to determine that which the State Court left undetermined, yet this court will limit the claim entitled to prefer-

ential consideration to those known to the Federal practice as six months' claims. This view of the matter seems to be warranted by the findings and decrees of the State Court authorizing the issuing of receiver's certificates, and defining the duties of the receiver in the payment of claims out of the income. If this view be followed, then there was a specific appropriation of the bonds for the payment of such claims, and the question of diversion does not arise. The objections taken to specific claims, set forth in Schedule D, for the various reasons set forth in the petitions for re-hearing, seem to be well taken and will be sustained.

And afterwards, to wit, on the 8th day of October, A. D., 1902, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Entry——.

Journal——, page——.

*Order on Exceptions, &c.*

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, as Trustee, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, and others, Defendants.

THE MERCANTILE TRUST COMPANY OF NEW YORK, as Trustee, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD COMPANY, Defendant.

In Equity. Consolidated Cause. No. 887.

319 *Decree of October 8, 1902, on exceptions to report of H. M. Butler, special master.*

On the 5th day of April, and the 21st day of June, 1902, came on to be heard the exceptions to the reports of H. M. Butler, Special Master, made pursuant to the orders of reference contained or referred to in paragraphs IV., XXIII. (5), XXXII. and XXXVII. of the decree herein of November 25th, 1901, which reports were filed herein as follows: that in regard to the diversion of earnings on February 20th, 1902; that in regard to

interest on certain two hundred and four (204) prior lien bonds, likewise on February 20th, 1902; and those in regard to the claims against certain eight hundred (800) prior lien bonds, on May 8th, 1902, and on June 6th, 1902, the latter report being supplemental to the preceding; and the same were argued by counsel for the exceptors and the complainants, defendants and respondents respectively, whereupon, upon consideration thereof, it is

Ordered, adjudged and decreed by the Court as follows:

I. That the exceptions to the report of the Special Master in regard to diversion, filed February 20th, 1902, be and the same hereby are overruled, except so far as said report changes the amounts of the claims of six months' claimants as hereinbefore found by said Master or fund in the decree of March 10th, 1902, to which said exceptions are sustained on the ground that the amounts of said claims were not referred to him.

II. That the exceptions to the report of the said Special Master filed February 20th, 1902, with regard to interest on certain two hundred and four (204) prior lien bonds, in so far as said exceptions relate to the finding of the said Master that George W. Sinks, Trustee, held the said two hundred and four (204) bonds for the purposes expressed in the agreements of January 20th, 1896, and January 27th, 1897, are overruled.

III. That the exceptions to the said Master's report filed February 20th, 1902, in regard to coupons upon the said two hundred and four (204) prior lien bonds, are sustained, and it is hereby found and decreed that no coupons are allowable on account of the said two hundred and four (204) bonds, to-wit, bonds numbered 152 to 200, 536 to 546, 559 to 669, and 1127 to 1159, that all coupons thereon should be detached, but that said bonds should be allowed interest at five per cent. per annum from their maturity, viz: October 1st, 1900.

341 IV. That with regard to the exceptions to the Master's report filed herein on May 8th, 1902, and the report supplemental thereto filed June 6th, 1902:

(A) The claim of George W. Sinks, Trustee, is allowed and is hereby stated to consist of the following items:

(*a*) Fifteen thousand four hundred and thirty-eight and 99-100 dollars ($15,438.99), with interest thereon at the rate of seven per cent. per annum from September 14th, 1895, to September 24th, 1902.

(*b*) Two thousand five hundred and seventy-three and 33-100 dollars ($2,573.33), with interest thereon at the rate of seven per cent. per annum from July 26th, 1899, to September 24th, 1902.

(*c*) Seven thousand dollars ($7,000) without interest: and to amount to $33,175.97.

That the said George W. Sinks first use the proceeds of certain forty-two (42) bonds, and the coupons thereof, and interest thereon to satisfy the said claim for the principal and interest thereon, said forty-two (42) bonds being certain twelve (12) bonds numbered 789, 790, 881 to 887, 910, 912 and 913, now in the hands of the said George W. Sinks, certain twenty-four (24) bonds numbered 889 to 908 and 148 to 151 in the hands of Joseph Robinson, the receiver in this cause, which bonds the said receiver is hereby directed forthwith to turn over to the said George W. Sinks, and certain six (6) bonds numbered 1186 to 1191 on deposit with the Fidelity & Deposit Company of Maryland, or in the hands of the said Joseph Robinson as receiver, which said last mentioned six bonds said Fidelity & Deposit Company of Maryland is hereby ordered and directed forthwith to turn over to said receiver, and which said forty-two bonds the said receiver is hereby directed to immediately obtain and turn over to the said George W. Sinks.

(B) The claim of John P. McCune, Trustee, is allowed and is hereby stated to be sixty-three thousand one hundred and eigthy-two and 13-100 dollars ($63,182.13), with interest payable semi-annually at the rate of seven per cent. per annum on thirteen thousand, one hundred and eighty-two and 13-100 dollars ($13,182.13) thereof from March 7th, 1897, and on fifty thousand dollars ($50,000) thereof from May 19th, 1897, to September 24th, 1902, and to amount to $90,519.79; that to the payment of the said claim there first be devoted the proceeds of the sale applicable to the payment of the one hundred (100) prior lien bonds numbered 570 to 669, and the interest thereon, as may be hereafter decreed.

342 (C) That the claim of the holders of the Monsarrat certificates, the same having been previously allowed by this court, is stated to be five hundred thousand dollars ($500,000) principal, with interest at the rate of six per cent. per annum from January 1st, 1897, to September 24th, 1902, such interest amounting to the sum of one hundred and seventy-one thousand, nine hundred and sixteen and 67-100 dollars (171,916.67); the said claim with such interest amounting to the sum of six hundred and seventy-one thousand, nine hundred and sixteen and 67-100 dollars ($671,916.67).

(D) That claims in Schedule D of said report filed May 8th, 1902, entitled to claim in the proceeds of the said eight hundred (800) prior lien bonds and the coupons belonging thereto, and the interest thereon, are reduced to and are hereby stated to be the following in the following amounts:

| | | |
|---|---|---|
| | American Railway Guide Co. | $75.00 |
| | American Waste Co. | 74.12 |
| | E. J. Brooks & Co. | 25.00 |
| | Busy Bee Candy Kitchen | 4.00 |
| | Cleveland Twist Drill Co. | 5.06 |
| | Cambridge Roofing Co. | 25.48 |
| | Streeter Amet. W. & R. Co. | 150.00 |
| | Crerar, Adams & Co. | 38.86 |
| | Cleveland Cooper Ferrule Co. | 50.19 |
| | Dayton Mfg. Co. | 107.07 |
| | Fay & Egan Co. | 26.88 |
| | The B. F. Goodrich Co. | 46.06 |
| | M. L. Hull | 8.00 |
| | Joint Rate Inspection Bureau | 31.58 |
| | Joyce, Cridland Co. | 8.20 |
| | Kling & Wilson | 6.76 |
| | F. B. Karl | 32.90 |
| | Lawrence, W. W. & Co. | 27.69 |
| | Marion Steam Shovel Works | 112.26 |
| | Mechanical Mfg. Co. | 65.00 |
| | New York Air Brake Co. | 116.15 |
| | New York & Western Coal Co. | 50.00 |
| | Pittsburg & Lake Erie R. R. Co. | 7.38 |
| | Ruggles, Gale & Co. | 4.00 |
| | Reynolds Bros. | 50.48 |
| | The Sargent Co. | 89.08 |
| | S. Severance | 251.53 |
| | Spahr & Glenn | 105.00 |
| | Wabash R. R. Co. | 2.67 |
| | Westwater, J. M. & W. | 53.20 |
| | Morris & Christian L. & S. Co. | 1.33 |
| 343 | Pittsburg Forge & Iron Co. | 129.26 |
| | Detroit Lubricator Co. | 27.00 |
| | H. M. Deal & Co. | 2.88 |
| | | $1,810.07 |

Interest should be allowed on the aforementioned claims from July 5th, 1895, at the rate of six per cent. per annum, making the total of principal and interest due thereon, $2,593.83.

(E) That the following claims scheduled by the Master in said Schedule D.,

Ajax Forge Co. note, $300.00; National Tube Works notes, $500.00; are secured by the deposit of one hundred and four (104) bonds aforesaid, now in the hands of George W. Sinks,

Trustee, and are likewise entitled to participate in the proceeds of said eight hundred (800) bonds, and that the same are entitled to be paid in full by the application thereto from the proceeds of sale applicable to said one hundred and four (104) bonds of fifty per cent. of the principal and interest of said claims, and from the proceeds of sale applicable to said eight hundred (800) bonds, the balance of said principal and interest; said fifty per cent. and balance each amounting to $605.00.

V. That the proceeds of the said eight hundred (800) prior lien bonds, numbered 1201 to 2000, both inclusive, and of the coupons belonging thereto, and of the interest thereon, shall be devoted:

First: To the payment of so much of the claim of George W. Sinks as may remain after applying theron the proceeds of the sale applicable to the payment of the hereinbefore mentioned forty-two (42) bonds and their coupons and interest as directed in paragraph IV A hereof, the said Sinks thereupon to surrender said eight hundred (800) bonds to the Mercantile Trust Company of New York for the benefit of the others decreed to be interested therein.

Second: To the payment of fifty per cent. of the principal and interest on the Monsarrat certificates as set forth in paragraph IV E hereof.

Third: To the payment *pari passu* of the sums due for principal and interest on the Monsarrat certificates as set forth in paragraph IV C hereof, the sums due for principal and interest on the claims in Schedule D as set forth in paragraph IV D hereof, and the balance that shall be due on account of principal and interest due on the claim of John P. McCune,
344 Trustee, after the application directed in paragraph IV B hereof shall have been made.

Fourth: To the payment of other scrip.

VI. That the exceptions to the said Master's reports and supplemental report filed February 20th, May 8th, and June 6th respectively, are sustained in so far as they are consistent with the foregoing findings and directions, and are overruled in so far as they are inconsistent therewith.

VII. That Joseph F. Randolph and the North American Trust Company are deemed to have duly filed exceptions to the said Master's reports of May 8th and June 6th, and that the said exceptions are hereby overruled.

And afterwards, to-wit, on the 8th day of October, A. D. 1902, an entry was made upon the Journal of said Court, clothed in the words and figures following, to-wit:

Journal——— Page———

*Decree of confirmation and distribution, entered October 8, 1902.*

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, as Trustee, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD Company, and others, Defendants.

THE MERCANTILE TRUST COMPANY OF New York, as Trustee, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING Railroad Company, Defendant.

No. 887.
In Equity.
Consolidated Cause.

*Decree of confirmation and distribution.*

This cause came on to be heard this eighth day of October, 1902, upon motion of Paul D. Cravath to confirm the
345 sale of all and singular the railroad, property, rights and franchises of The Columbus, Sandusky and Hocking Railroad Company, made by Joseph Robinson, Special Master, on September 24, 1902, pursuant to a decree of Court herein; and it appearing from the report of sale of said Special Master and from the affidavits of the publishers of the hereinafter mentioned newspapers that said Special Master duly advertised said property for sale at the time and place aforesaid in the Ohio State Journal, a newspaper of general circulation published in the city of Columbus, county of Franklin, Ohio, in which county the greater portion of the property ordered to be sold was located, and in the Commercial-Tribune, a newspaper of general circulation published in the city of Cincinnati, county of Hamilton, Ohio, and in the Commercial Advertiser, a newspaper of general circulation published in the city, county and state of New York, once a week for six consecutive weeks prior to the date of the said sale; that upon the 24th day of September, 1902, at the hour and place named, said property as an entirety was sold at public auction by the said Special Master to Paul D. Cravath, the highest, best and only bidder at the aforesaid sale; and that the said Paul D. Cravath has complied with the order and decree of sale, first by depositing with the said Special Mas-

ter, prior to the said sale, the sum of $50,000 by certified check, payable to B. R. Cowen, Clerk, drawn upon the Standard Trust Company of New York, an incorporated Trust Company in the city of New York, and, second, by transferring to, and depositing with the said Special Master, subsequent to the acceptance of his bid, a certificate of the said Standard Trust Company certifying that the said Standard Trust Company held, subject to the order of said Paul D. Cravath, $250,000 par value of the receiver's certificates, issued by S. M. Felton, receiver of this court in this cause appointed; and it further appearing that the report of the said property and the sale thereof at public auction to the said Paul D. Cravath, was filed herein upon the twenty-fifth day of September, 1902, and all the parties, intervenors and claimants to this cause duly cited to show cause why the said sale should not be approved and confirmed, but that no exceptions have been taken to the said sale;

Now, upon careful examination and consideration of all and singular the proceedings of the said Special Master, the court being satisfied that the said sale has been fairly and properly conducted in all respects in conformity to the law and the orders of this court, it is

346 Ordered, adjudged and decreed that the said proceedings and sale be and they are hereby all and singular approved and confirmed; and it is further

Ordered, adjudged and decreed that when said purchaser has paid to Joseph Robinson, Special Master, the purchase price of said property, either in cash, including as a part thereof the $50,000 heretofore deposited with the Special Master prior to the said sale to qualify the said purchaser as a bidder thereat, or by turning in to the said Special Master for receipt and cancellation the receiver's certificates issued by S. M. Felton or Joseph Robinson, receivers in the said cause or any of such uncontested liens as have heretofore been adjudged to be prior in lien to the first mortgage, at their face value and accrued interest, or first mortgage bonds or coupons of the said The Columbus, Sandusky & Hocking Railroad Company at the rates of par for the coupons, and $507.63 per bond and has further assumed simultaneously with the conveyance of the property to him the payment of any indebtedness, obligations or liabilities, if any, other than the receiver's certificates, which shall have been contracted or incurred by either of the receivers in this cause before delivery of the possession of the property sold, in the management, operation, use or preservation thereof, the said Special Master shall make to the purchaser a deed in fee simple to the aforesaid railroad, property, rights and franchises of the Columbus, Sandusky & Hocking Railroad Company, and the receiver shall deliver the premises sold to the purchaser,

his heirs, or assigns, together with any moneys, property and net income if any, acquired or received by the receivers since the commencement of this suit and up to the date of such delivery of possession, in the management or operation of the mortgaged premises, embraced in such conveyance, without, however, prejudice to such rights as may exist in favor of the holders of the claims of W. S. Gregg, The Adams & Westlake Company, William Harland & Sons; Hann & Adair; The National Tube Works; Pittsburg Forge & Iron Company; Harmon & Robinson, receivers of the Baltimore & Ohio Southwestern Railway Company; Louisville & Nashville Railroad Company; Indiana, Decatur and Western Railway Company; U. S. Bronze Company; N. & G. Taylor Company; Cincinnati, Hamilton & Dayton Railway Company; Merchant & Company; E. E. Shedd & Company; Standard Scale & Supply Company; Charles Scott Spring Company; S. M. Kinsey, executrix, and the E. A. Kinsey Company, or their assigns, commonly known as six months' claimants to have any net earnings of the receivership
347 applied to the payment of their claims, the said Special Master reserving, however, a lien upon and right to retake and resell the said property should the said purchaser, his heirs, or assigns fail, within thirty days after the service of an order of this court to that effect, to pay any of the aforesaid indebtedness, obligations or liabilities of the receivers in this cause other than receiver's certificates, or any sum of money that it may finally be determined the hereinbefore enumerated six months' claimants are entitled to be paid by virtue of their claim to have any net earnings of the receivership applied to the payment of their respective claims.

And it is further

Ordered, adjudged and decreed that the books, records, vouchers, documents and other papers turned over to him by the receiver shall be held by the purchaser or his assigns subject to the orders of this court, heretofore made and hereafter to be made herein; and it is further

Ordered that the defendants, Jonas M. McCune, Jacob Klee, Ed. H. Zurhorst, the Second National Bank of Sandusky, Horatio S. Atcheson, The Mercantile Trust Company and the Metropolitan Trust Company of the City of New York, and each of them, shall enter, or in default of such action on the part of either the above named parties, the clerk of this court shall cause to be entered upon the margin of the mortgage or conveyance to each of the said parties in the counties wherein the property lies a release of their liens upon, or interest in the said property.

And the cause coming further to be heard upon motion of Paul D. Cravath to fix and determine the costs of this action,

including allowances to the complainants and other parties and their solicitors, and the distributive value of the first mortgage bonds and coupons of the said railroad company, and to distribute the proceeds of sale;

Now, upon consideration of all the papers, pleadings and proceedings in this cause, and after hearing Charles C. Deming on behalf of the plaintiff, The Mercantile Trust Company, and Herbert Parsons on behalf of the complainant, The Metropolitan Trust Company of the City of New York, and Lawrence Maxwell, Jr., on behalf of Joseph Robinson, the receiver of this court, and Judson Harmon on behalf of the Railroad Equipment Company; and Harlan Cleveland and George Hoadly on behalf of W. S. Gregg and other six months' claimants, and W.
348 O. Henderson and Charles E. Burr on behalf of George W. Sinks, individually and as trustee, and John P. McCune, trustee, and other parties and claimants, it is

Found that the taxable costs of this action, payable out of the proceeds of sale, including the allowance of $1,500 to the Special Master for effecting the said sale and the costs of advertising and other expenses in connection therewith, amount to the sum of $4,458.30; and it is further

Found that the amount now due with interest upon the lease warrants of the Railroad Equipment Company upon certain of the rolling stock in the hands of the receiver is the sum of $59,230.68, claimed by Arthur and Emile Levita, partners as Levita & Company, under their judgment and attachment against the Railroad Equipment Company and the receiver in this cause as garnishee, and that the First National Bank of New York and others, intervenors in this cause, claim to be the owners of said lease warrants and entitled to the amount due thereon, in consideration whereof it is ordered that out of the proceeds of sale said Special Master shall pay said sum of $59,230.68 into The Mercantile Trust Company of the City of New York, the same with the interest accruing thereon to be held by the said Trust Company subject to the future order of his court upon final adjudication of the rights of the respective claimants to said fund.

And it is

Further found that there is due and payable out of the proceeds of sale to Jonas M. McCune, the sum of $3,398.04; to Jacob Klee, the sum of $1,000.83; to the Second National Bank of Sandusky the sum of $7,696.87; to Horatio S. Atcheson, guardian of the person and property of Alfred K. Atcheson, the sum of $1,794.00; and to the holders of receivers' certificates heretofore issued by S. M. Felton or Joseph Robinson, receivers of this court, including interest thereon to October 13, 1902, the sum of $1,080,139.55; and it is further

Found and decreed that the sum of $60,000.00 should be, and the same hereby is, allowed to the complainants, the Metropolitan Trust Company and The Mercantile Trust Company in full of their services and the services of their respective solicitors herein and $5,747.25 in full of their disbursements.

And it is further

Found and decreed that the sum of $25,000 should be, and the same hereby is, allowed to Joseph Robinson, the receiver
349 in this cause, and the sum of $25,000 to his counsel, Lawrence Maxwell, Jr., by way of extra compensation for their services rendered herein, and for services of said Maxwell in the state courts of Ohio and in the United States Circuit Court of Appeals and in the Supreme Court of the United States, the same to be additional to such amounts as they have heretofore received or become entitled to receive from the earnings of the receivership; and it is further

Found and decreed that the sum of five thousand dollars should be and the same hereby is allowed to W. O. Henderson and Charles Burr, as partial compensation for their services rendered herein upon behalf of the various interests represented by them; and it is further

Found and decreed that the sum of five thousand ($5,000.00) dollars be and the same is hereby allowed to H. M. Butler, in addition to the payments heretofore made to him in full for his services as Special Master herein; together with $207 additional for his disbursements; and it is further

Found that the sum of $150 be and the same hereby is allowed to Francis C. Huntington in full for his services as special examiner herein; and it is further

Found that Joseph Robinson, Special Master, will require the sum of $100 for the purpose of advertising the distribution of the proceeds of sale to the holders of the Felton and Robinson certificates, and of the first mortgage bonds and coupons of the said railroad company, and it is further

Found that there are now pending in this action contested claims asserting a priority over the first mortgage bonds of the said Railroad Company, and known as six months' claims of the following persons and corporations: W. S. Gregg, the Adams & Westlake Company, William Harland & Sons, Hann & Adair, The National Tube Works, Pittsburg Forge & Iron Company, Harmon and Robinson, receivers of the Baltimore & Ohio Southwestern Railway Company, Louisville & Nashville Railroad Company, Indiana, Decatur, & Western Railway Company, U. S. Bronze Company, N. & G. Taylor Company, Cincinnati, Hamilton & Dayton Railway Company; Merchant & Company; E. E. Shedd & Company; Standard Scale and Supply Company; Charles Scott Spring Company; S. M. Kinsey, executrix, and

the E. A. Kinsey Company, amounting in the aggregate, with interest to about the sum of $57,515.75, which have heretofore been adjudicated against said claimants, and notice having been given in open court of the intention of said claim-
350 ants, or some of them, to appeal from such adjudication, and asking that sufficient funds be not distributed, but withheld to protect said claimants, now, on condition that said claimants shall duly take an appeal from said adjudication within thirty days from the date of this decree, as stipulated in this cause.

It is ordered that out of the proceeds of sale the said Special Master shall pay into the The Mercantile Trust Company, of the City of New York, the same, with the interest accruing thereon, to be held by its subject to the further order of this court, as security for the payment of such of said claims as may hereafter be finally allowed as liens upon the proceeds of sale of said property prior to the lien of the first mortgage bonds, the sum of $57,515.75.

When the said sum of $57,515.75 and the interest accrued thereon or any part thereof, shall be released, the same shall be distributed *pro rata* upon all the first mortgage bonds, except as herein otherwise directed.

And it is

Ordered, adjudged and decreed that the Special Master pay out of the proceeds of the sale of the said property all of the foregoing items found or decreed due, except the sum of $18,000 of the $25,000 ordered to be paid to Joseph Robinson, Receiver, which sum of $18,000 the Receiver shall pay himself out of the assets in his hands, and that the balance of the said purchase price remaining after the payments of the said items, and making the aforesaid deduction for six months' claims, said balance amounting to the sum of $1,426,561.73 be distributed as follows:

To the holders of the coupons maturing April 1, 1896, of the following first mortgage bonds.

Bonds 148-151, both inclusive.
Bonds 276-535, both inclusive.
Bonds 670-687, both inclusive.
Bonds 693-696, both inclusive.
Bonds 1201-2000, both inclusive,

the sum of $22,621.38.

To the holders of the coupons maturing October 1st, 1896, of the following first mortgage bonds:

Bonds 148-151, both inclusive.
Bonds 201-535, both inclusive.
Bonds 547-558, both inclusive.
Bonds 670-687, both inclusive.
Bonds 693-696, both inclusive.

Bonds 709-752, both inclusive.
Bonds 798-812, both inclusive.
351 Bonds 813-847, both inclusive.
Bonds 1201-2000, both inclusive.
the sum of $31,675.

To the holders of the coupons of all the first mortgage bonds maturing April 1st, 1897, except the coupons then maturing of the following bonds:

Bonds 152-200, both inclusive.
Bonds 536-546, both inclusive.
Bonds 559-669, both inclusive.
Bonds 688-692, both inclusive.
Bond 788.
Bonds 912-914, both inclusive.
Bonds 1060-1119, both inclusive.
Bonds 1127-1159, both inclusive.
Bonds 1180-1195, both inclusive.
Bonds 1198-1200, both inclusive,
the sum of $42,700.

To the holders of the coupons of all said bonds maturing October 1st, 1897, except the coupons then maturing on certain 204 bonds numbered as follows:

Bonds 152-200, both inclusive.
Bonds 536-546, both inclusive.
Bonds 559-659, both inclusive.
Bonds 1127-1159, both inclusive.
being the 204 bonds deposited with George W. Sinks, as trustee, under agreement, dated January 20, 1896, and January 27, 1897, the sum of $44,900.

To the holders of the coupons of the said bonds maturing April 1st, 1898, excluding the coupons on the said 204 bonds, the sum of $44,900.00.

To the holders of the coupons of the said bonds maturing October 1st, 1898, excluding the coupons on the said 204 bonds, the sum of $44,900.

To the holders of the coupons of the said bonds maturing April 1st, 1899, excluding the coupons on the said 204 bonds, the sum of $44,900.00.

To the holders of the coupons of the said bonds maturing October 1st, 1899, excluding the coupons on the said 204 bonds, the sum of $44,900.

To the holders of the coupons of the said bonds maturing April 1st, 1900, excluding the coupons on the said 204 bonds, the sum of $44,900.

To the holders of the coupons of the said bonds maturing October 1st, 1900, excluding the coupons on the said 204 bonds, the sum of $44,900.

To the holders of all of said mortgage bonds, on account of the principal and interest thereon since October 1st, 1900, the sum of $1,015,265.35; being the sum of $507.63 on each of said bonds.

352 It is ordered however, that the sums payable on account of bonds numbered 683 to 687, both inclusive, and the coupons appertaining thereto be paid into the registry of this court to await the further order of this court.

It is further ordered that the sum of tweny-nine thousand, seven hundred and three dollars and seventy-eight cents ($29,703.78) payable as aforesaid on account of the forty-two bonds and coupons appertaining thereto, being bonds numbered 148 to 151 inclusive, and 889 to 908 inclusive, 789 to 790 inclusive, 881 to 887 inclusive, 910, 912 and 913, and 1186 to 1191 inclusive, held or to be held by George W. Sinks, as trustee, be paid to said George W. Sinks or his order, on account of the amount of $33,175.97, found due him by the decree entered herein on the 7th day of October, 1902, leaving a balance of $3,472.19 due to him, and that the sum of fifty thousand, seven hundred and sixty-three dollars ($50,763) due as aforesaid on account of the one hundred bonds, numbered 570 to 669, inclusive, held by said Sinks as trustee, be paid to John P. McCune, Trustee, or his order, on account of the amount found to be due by the decree hertofore entered herein on this day, viz: $90,519.79, leaving a balance of $39,756.79 due to said McCune, and it is ordered that out of the sums due on account of the principal and interest on the aforesaid 100 bonds, there be first paid to W. O. Henderson and Charles E. Burr, or to their order, the sum of $5,000 an account of services in behalf of those beneficially interested therein.

And it is further ordered that out of the sums due upon account of the principal and interest on the 104 bonds numbered 152 to 200 inclusive, 536 to 546 inclusive, 559 to 569 inclusive, and 1127 to 1159 inclusive, there be first paid to Charles E. Burr and W. O. Henderson, or to their order, the sum of $5,000 on account of their services in behalf of those beneficially interested therein; and that the balance of said sums due on account of said principal and interest of said 104 bonds be paid to George W. Sinks, trustee, or to his order, for the benefit *pro rata* of the beneficiaries thereof, named in Exhibit E, pages 958 and 959 of the printed record herein, as their interests may appear.

It is further ordered that from the sum of six hundred and two thousand, seven hundred and sixty-eight dollars ($602,768) payable on account of the eight hundred bonds numbered 1201 to 2000 inclusive, with the coupons appertaining therto, held by George W. Sinks, as trustee, there be first deducted by the

said master the sum of thirty thousand dollars to be
333 paid into The Mercantile Trust Company of the City of New York, the same with the interest accruing thereon to be held by said Trust Company subject to the further order of this court, to await the final adjudication of the claims of the following holders of the first mortgage bonds scrip of the said Railroad Company, which said claims have heretofore been adjudicated against said claimants, viz:

| | |
|---|---|
| Estate of John W. King, | |
| 2 of the same, calling on their face for ..... | $48.76 |
| Durant, Hoover & Co., | |
| 22 of same, calling on their face for ..... | 3,322.99 |
| Standard Trust Co., of New York, | |
| 66 of same, calling on their face for ..... | 16,672.77 |
| North American Trust Company, | |
| 66 of same, calling on their face for ..... | 9,264.17 |
| Joseph F. Randolph, | |
| 13 of same, calling on their face for ..... | 2,971.39 |
| The Pennsylvania Steel Company, | |
| 3 of same, calling on their face for ..... | 4,674.70 |
| Charles H. Graham, | |
| 1 of same, calling on its face for ..... | 975.00 |
| J. J. Seigling, | |
| 1 of same, calling on its face for ..... | 24.38 |
| Margaret Knox, | |
| 1 of same, calling on its face for ..... | 414.38 |

Provided, however, that said amount shall be distributed by said Master unless the holders of said scrip shall within thirty days from the date of this decree duly take an appeal from such adjudication, and file a bond to cover the costs of said appeal.

When the said sum of $30,000 and the interest accrued thereon, or any part thereof, shall be released, the same shall be distributed *pro rata* among the beneficiaries of said 800 bonds, except as herein otherwise directed.

And it is further ordered that the balance of the proceeds distributable to the 800 first mortgage bonds, numbered 1201 to 2000, both inclusive, and of the coupons belonging thereto and of the interest thereon be devoted

First: To the payment of so much of the claim of George W. Sinks, amounting as hereinbefore found to $33,175.97, as may remain after applying thereon the proceeds of the sale applicable to the payment of the hereinbefore mentioned forty-two
351 bonds, and their coupons and interest, said balance being $3,472.19. The payment into court of any of the sums hereinbefore mentioned shall not affect the payment

forthwith in full of the said claim of Sinks, but any portion withheld of the distributive share of any of the said forty-two bonds and the coupons thereon shall, when released, inure to the benefit of and be paid over into the fund arising from the proceeds of said 800 bonds and the coupons thereof. Said Sinks, upon payment in full of his claim shall surrender said forty-two bonds and the 800 bonds *to the Mercantile Trust Company* for the benefit of the others beneficially interested in the 800 bonds.

Second: To the payment in full of fifty per cent. of the principal and interest, said fifty per cent. amounting to $605, of the claim of Ajax Forge Co. and the National Tube Works Co.

Third: To the payment *pari passu* of (*a*) the sums due for principal and interest on the Monsarrat certificates, amounting to $671,916.67, (*b*) the balance that shall be due on account of the principal and interest due on the claim of John P. McCune, Trustee, the said balance amounting to $39,756.79, and (*c*) the sums due for principal and interest, amounting to $2,593.83 of the following claims:

| | Principal | Principal & Interest |
|---|---|---|
| American Railway Guide Co. | $75.00 | $107.47 |
| American Waste Co. | 74.12 | 106.21 |
| E. J. Brooks & Co. | 25.00 | 35.82 |
| Busy Bee Candy Kitchen | 4.00 | 5.73 |
| Cleveland Twist Drill Co. | 5.06 | 7.25 |
| Cambridge Roofing Co. | 25.48 | 36.51 |
| Streeter Amet. W. & R. Co. | 150.00 | 214.95 |
| Crerar, Adams & Co. | 38.86 | 55.68 |
| Cleveland Cooper Ferrule Co. | 50.19 | 72.02 |
| Dayton Mfg. Co. | 107.07 | 153.43 |
| Fay and Egan Co. | 26.88 | 38.52 |
| The B. F. Goodrich Co. | 46.06 | 66.00 |
| M. L. Hull | 8.00 | 11.46 |
| Joint Rate Inspection Bureau | 31.58 | 45.25 |
| Joyce, Cridland Co. | 8.20 | 11.75 |
| Kling & Wilson | 7.76 | 9.68 |
| F. B. Karl | 32.90 | 47.14 |
| Lawrence, W. W. & Co. | 27.69 | 39.68 |
| Marion Steam Shovel Works | 112.26 | 160.86 |
| Mechanical Mfg. Co. | 65.00 | 93.14 |
| New York Air Brake Co. | 116.15 | 166.44 |
| New York & Western Coal Co. | 50.00 | 71.65 |
| 355 Pittsburgh & Lake Erie R. R. Co. | 7.38 | 10.57 |
| Ruggles, Gale Co. | 4.00 | 5.73 |
| Reynolds Bros. | 50.46 | 72.33 |
| The Sargent Co. | 89.08 | 127.65 |

| | | |
|---|---|---|
| S. Severance | 251.53 | 360.44 |
| Spahr & Glenn | 105.00 | 150.46 |
| Wabash R. R. Co. | 2.67 | 3.83 |
| Westwater, J. M. & W. | 53.20 | 76.24 |
| Morsis & Christian L. & S. Co. | 1.33 | 1.90 |
| Pittsburg Forge & Iron Co. | 129.26 | 185.23 |
| Detroit Lubricator Co. | 27.00 | 38.69 |
| H. M. Deal & Co. | 2.88 | 4.12 |
| | $1,810.07 | $2,593.83 |

When the portions withheld of the distributive shares of said 100 bonds and said 800 bonds shall be released, such adjustments so far as possible shall be made as will effect payments to the beneficiaries mentioned in this third paragraph such as would have been made if no part of the distributive share of bonds and coupon had been withheld under this decree.

It is ordered that the amounts hereinbefore ordered to be paid out of the proceeds of sale to Joseph Robinson, receiver ($7,000), Lawrence Maxwell, Jr. ($25,000), W. O. Henderson and Charles E. Burr ($5,000), and H. M. Butler ($5,207), and the costs of this cause ($4,458.30), aggregating the sum of $46,665.30 be paid out of the sum of $50,000 paid by Paul D. Cravath, purchaser, and now deposited to the credit of this cause in the registry of the court, and that the Special Master, Joseph Robinson, forthwith and hereafter, as from time to time the same shall be received by him, deposit with the Mercantile Trust Company, of the City of New York, subject to the order of this court, all sums of money and all certificates, bonds and coupons received by said Master under any of the provisions of this decree, except as herein otherwise ordered; the same, with the interest accrued thereon, to be paid and distributed by the said Trust Company in accordance with the provisions of this decree. Said Trust Company shall cancel all Receiver's certificates and coupons paid by it and shall endorse upon each first mortgage bond the Monsarrat certificate every payment made by it on account thereof.

It is further ordered that the Receiver file as soon as he conveniently can do so, his final report and account herein, including therein the current accumulated assets, accounts and
all the resources of the said receivers turned over to the
356 purchaser herein, his heirs or assigns, under this decree
and that said final account and all prior accounts of said receiver and his predecessor, Samuel M. Felton, be on the filing of said final account referred to a Special Master hereinafter to be named, to examine and report to this court upon all ques-

tions as to the rights of the six months' claimants in this decree, hereinbefore named, to have any net earnings of the receivership aplied to the payment of their said claims.

And afterwards, to wit, on the 13th day of October, A. D., 1902, the following stipulation was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Stipulation.*

It is stipulated between the parties hereto, namely: The Metropolitan Trust Company of the City of New York, The Mercantile Trust Company of New York, Joseph Robinson, receiver herein, and the following six months' claimant- whose claims have been presented under the orders of the court heretofore made herein before the Special Master and allowed as per the report of the Special Master and the decree of the court confirming the same, namely: W. S. Gregg, Adams and Westlake Company, William Harland & Sons, Hann and Adair, The National Tube Works, Pittsburg Forge & Iron Company, Harmon and Robinson, receivers of the Baltimore and Ohio Southwestern Railway Company, Louisville and Nashville Railroad Company, Indiana, Decatur and Western Railway Company, U. S. Bronze Company- N. & G. Taylor Company, The Cincinnati Hamilton and Dayton Railway Company, Merchant and Company, E. E. Shedd & Company, Standard Scale and Supply Company, Charles Scott Spring Company, S. M. Kinsey, executrix, and the E. A. Kinsey Company, as follows: That any one of said six months' claims aforesaid may be used as a test claim in proceedings on appeal to review the orders of the court heretofore or hereafter to be made herein as to the priority or otherwise of said claims, the right to share in the proceeds of the sale of the property involved herein, or any other rights and that the final determination of the rights of all of said six months' claims above named shall abide the result of the proceedings on appeal which may be brought by said claimants.

357 It is further stipulated that the other six months' claimants above named need not prosecute proceedings in error or on appeal to review any of the orders of said court, and such failure to prosecute error or appeal shall not prejudice the rights of said six months' claimants, but that on the final disposition of the appeal of the claimant so taking the same, the same rights shall accrue to the other six months' claimants as may be adjudged to said claimant so taking said appeal, and the same orders made as to the rights of said other six months' claimants as if proceedings to review said orders of the court as to said other claims had been duly prosecuted.

It is further stipulated that the bond on appeal to be taken from the decree to be entered the 8th day of October, 1902, shall be a cost bond simply, and that said appeal shall be taken within thirty days.

Cincinnati, Oct. 7, 1902.

THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK.
By PARSON, SHEPHERD & OGDEN, *Its Solrs.*
THE METROPOLITAN TRUST COMPANY OF NEW YORK,
By ALEXANDER & GREEN.
W. S. GREGG AND OTHER SIX MONTHS' CLAIMANTS,
By HARLAN CLEVELAND.
HERRON, GATCH & HERRON,
HARMON, COLSTON, GOLDSMITH & HOADLY,
*Their Solicitors.*
JOSEPH ROBINSON, *Receiver.*
By LAWRENCE MAXWELL, JR., *Counsel.*
THE CINCINNATI, HAMILTON & DAYTON RY. CO.,
By THE INDIANA, DECATUR AND WESTERN RY. CO.

And afterwards, to wit, on the 25th day of October, A. D., 1902, the following petition was filed in the Clerk's office of said court, clothed in the words and figures following, to wit:

358 Consolidated Causes.

MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD Company, Defendant, } No. 887.

METROPOLITAN TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD Company, Defendant, } No. 816.

*Petition for Appeal.*

Winfield S. Gregg, intervening petitioner in the above entitled causes as consolidated, conceiving himself aggrieved by the or-

ders heretofore made in the above entitled proceedings, doth hereby appeal from said orders to the United States Circuit Court of Appeals for the Sixth Circuit, and he prays that this appeal may be allowed; that a bond may be fixed, and that a transcript of the record and proceedings and papers upon which said orders were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

WINFIELD S. GREGG,
By HARLAN CLEVELAND.

And afterwards, to wit, on the 25th day of October, A. D., 1902, the following assignment of errors was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Consolidated Causes.

| | |
|---|---|
| MERCANTILE TRUST COMPANY, TRUSTEE, Complainant, *vs.* THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD Company, Defendant, | No. 887. |
| METROPOLITAN TRUST COMPANY, TRUSTEE, Complainant, *vs.* THE COLUMBUS, SANDUSKY AND HOCKING RAILROAD Company, Defendant, | No. 816. |

*Assignment of Errors.*

Now comes the said Winfield S. Gregg, and makes the following assignment of errors and says that in the record and proceedings in the above entitled matter there is manifest error in this, to wit:

1st. Said Circuit Court erred in its order made herein on the 26th day of November, A. D. 1898, in refusing to issue Receiver's certificates as prayed for by the said intervening petitioner, and in denying the relief therein prayed.

2nd. Said Circuit Court erred in its decree of March 10th, 1900, November 25th, 1901, and October 8th, 1902, in ordering, adjudging and decreeing that the funds arising from the sale of the property therein described should be, after payment of the costs of said action and the Felton and Robinson certificates and certain liens therein mentioned applied to the payment of the entire amount due principal and interest on

the outsanding bonds secured by the prior lien mortgage, and thereafter to the amounts due for principal and interest on the bonds secured by the general mortgage, and in not holding and decreeing that the proceeds of said sale, after the payment of the costs, should be applied to the payment of the claim of Winfield S. Gregg, intervening petitioner herein, equally with the Felton and Robinson certificates, and in not holding and decreeing that said claim of Winfield S. Gregg, intervening petitioner herein, was entitled to payment out of the proceeds of the sale of said property prior to the amounts due on bonds secured by the prior lien mortgage and bonds secured by the general mortgage.

3. Said Circuit Court erred in ordering, adjudging and decreeing that the intervening petition of Winfield S. Gregg, except so far as it sought to have said claim set forth therein allowed as a six months' claim, should be dismissed, and is not ordering, adjudging and decreeing that said Winfield S. Gregg was entitled as a six months' claimant for supplies and labor to a lien and preferential claim upon the *corpus* of the property prior to the lien of the prior lien mortgage and the general mortgage.

360 4th. Said Circuit Court erred in confirming the report of the Special Master that, to entitle the claim of said Winfield S. Gregg to a lien or preferential claim upon the *corpus* of the railroad property prior to the lien of the mortgages securing the bonds of said company, a diversion of earnings must be proved during the six months prior to the appointment of the Receiver, and that such claim could only be charged upon the *corpus* of the property if the income before or after the receivership had been applied directly to the beneficial purposes of the mortgage debt displaced and overruling the exceptions in that behalf to said report and in so holding and decreeing.

5th. Said Circuit Court erred in confirming the report of the Special Master that the claim of said Winfield S. Gregg was not a lien or preferential claim upon the *corpus* of the property in possession of the Receiver of the court, and that said Winfield S. Gregg had no such lien or preferential claim upon the *corpus* of said property, but must look for payment thereof to the earnings of said railroad only, and in so holding and decreeing and overruling the exceptions in that behalf to said report.

6th. Said Circuit Court erred in dismissing said intervening petition so far as it sought to have the claim of said Winfield S. Gregg for ties supplied during the month of May, which were in the possession of said railroad at the time of

the appointment of the Receiver, which came into the possession of, and were used by, the Receiver of said court to the amount and value of $3,200.00, allowed as a claim prior to the prior lien mortgage and general mortgage, and paid by the Receiver or out of the proceeds of the sale of the property prior to such mortgages.

7th. Said Circuit Court erred in holding and decreeing that, said Winfield S. Gregg, as a six months' claimant, was not entitled to be paid by the Receiver, but of the proceeds of the sale of the property of said Railroad Company ordered to be sold prior to the bonds secured by mortgages after having appointed a Receiver at the request of the trustees of the prior lien mortgage and general mortgage, and of the defendant Railroad Company under an order which expressly provided that such claims should be paid.

8th. Said Circuit Court erred in refusing to pay said claim of Winfield S. Gregg as a six months' claim, or to order its Receiver so to do, or to order the same to paid for prior
361 to the amounts found due on bond secured by the prior lien mortgage when it had paid, and ordered its Receiver to pay, certain of said six months' claims which were of no higher rank than said claim of Winfield S. Gregg.

9th. Said Circuit Court erred in overruling the exceptions to the Master's report filed herein February 20th, 1902, to the finding of the Master of the amount of diversion within the six and twelve months prior to the appointment of the Receiver herein, and in confirming said report as to the amount of, and what constituted, said diversions.

10th. Said Circuit Court erred in overruling the exceptions to the report of the Special Master filed herein February 20th, 1902, that there had been a restoration of earnings within the periods covered by said report and the orders of the court of any diversion from the current income of said railroad and in confirming the report of the Special Master in that behalf.

11th. Said Circuit Court erred in overruling the exceptions to the Master's report and in confirming said report to the effect that the proceeds from the sale of the mileage books was a restoration and his failure to find that such proceeds were current earnings.

12th. Said Circuit Court erred in overruling the exceptions to the Master's report as to the amount of funds derived from sources other than current earnings during the periods covered by said report, and in confirming the Master's report in that behalf.

13th. Said Circuit Court erred in overruling the exceptions to the conclusions of the Master that the payment from bor-

rowed money, or from funds derived from other sources than current earnings, within the periods covered by said report, of pay-rolls and debts and other current debts which were debts of the income, constituted a restoration of current earnings diverted for the benefit of mortgage bondholders.

14th. Said Circuit Court erred in overruling the exceptions to the Master's report and confirming said report to the effect that the payment from borrowed money, or funds derived from sources other than current earnings, of unsecured debts of the company which were not debts of the income, constituted a restoration of current earnings diverted for the benefit of bondholders.

15th. Said Circuit Court erred in overruling the exceptions to the Master's report for failure of the Master to find that in order to constitute a restoration of a diversion of
362 current earnings for the benefit of the bondholders, it must appear that money borrowed from the company was in fact, or might have been used for the making of such payments as are claimed to have constituted the diversion, and in confirming the report of the Master in that behalf.

16th. Said Circuit Court erred in decreeing the distribution of the proceeds of the sale of the mortgage property described in the bills herein as in the decree of October 8th, 1902, provided.

17th. Said Circuit Court erred in overruling the exceptions to the report of the Master that funds derived from the sale of the mileage tickets constituted a restoration, and in confirming said report in that behalf.

18th. Said Circuit Court erred in overruling in other respects the exceptions to the Master's report and confirming said report.

HARLAN CLEVELAND,
*Solicitor for W. S. Gregg.*

And afterwards, to-wit, on the 25th day of October, A. D. 1902, the following Appeal Bond as filed in the Clerk's office of said court clothed in the words and figures following, to-wit:

*Appeal Bond.*

Know all men by these presents, that we, Winfield S. Gregg, as principal, and Amos C. Helmick and Albert J. Longstreth, as sureties, are held and firmly bound unto The Metropolitan Trust Co., of the City of New York; The Mercantile Trust Co., of New York; Joseph Robinson, Receiver of the Columbus,

Sandusky & Hocking Railroad Co., and other parties to the Consolidated Cause No. 887, United States Circuit Court, Southern District of Ohio, Eastern Division, "Metropolitan Trust Co., &c., *r.* The Columbus, Sandusky & Hocking R. R. Co.," in the full and just sum of five hundred dollars ($500.00), to be paid to the said Metropolitan Trust Co., of the City of New York; The Mercantile Trust Co., of New York; Joseph Robinson, Receiver as aforesaid, and others, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of October in the year of our Lord one thousand nine hundred and two.

363 Whereas, lately at a session of the United States Circuit Court for the Southern District of Ohio, Eastern Division, in a suit pending in said court between The Metropolitan Trust Co., of the City of New York, complainant, and The Columbus, Sandusky & Hocking Railroad Co., *et al.*, defendants, No. 887, Consolidated Cause, wherein said Winfield S. Gregg, as an intervening petitioner, a decree or decrees was rendered against the said Winfield S. Gregg, and the said Winfield S. Gregg having obtained an appeal and filed a copy thereof in the Clerk's office of the said court to reverse the decree of the aforesaid suit, and a citation directed to the said Metropolitan Trust Co., of the City of New York; The Mercantile Trust Co., of New York; Joseph Robinson, Receiver, and others, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the 24th November, 1902.

Now, the condition of the above obligation is such, that if the said Winfield S. Gregg shall prosecute his appeal to effect, and answer all damages and costs if he may fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WINFIELD S. GREGG,
AMOS C. HELMICK,
ALBERT J. LONGSTRETH.

Sealed and delivered in the presence of:
C. T. MARSHALL,
EDWARD R. MEYER.

Approved by:
A. C. THOMPSON,
*Judge of the United States District Court,*
*for the Southern District of Ohio, sitting*
*and holding United States Circuit Court.*

UNITED STATES OF AMERICA, }
*Southern District of Ohio, Eastern Division, Muskingum Co.* }

Before me, Edward R. Meyer, a United States Commissioner in and for the district and county aforesaid, personally came Amos C. Helmick, one of the sureties within named, who, being by me first duly sworn, deposes and says that he is worth the sum of $1,000.00 in real estate over and above all his debts and liabilities in addition to all the exemptions and subject to execution and situate in the Southern District of Ohio and Eastern Division.

AMOS C. HELMICK.

364 Sworn to before me and subscribed in my presence, this 23d day of October, 1902.

EDWARD R. MEYER,
*U. S. Comr., S. D. O.*

UNITED STATES OF AMERICA, }
*Southern District of Ohio, Eastern Division, Muskingum Co.* }

Before me, Edward R. Meyer, a United States Commissioner in and for the district and county aforesaid, personally came Albert J. Longstreth, one of the sureties within named, who, being by me first duly sworn, deposes and says that he is worth the sum of $1,000.00 in real estate over and above all his debts and liabilities in addition to all exemptions and subject to execution and situate in the Southern District of Ohio and Eastern Division.

ALBERT J. LONGSTRETH.

Sworn to before me and subscribed in my presence this 23rd day of October, 1902.

EDWARD R. MEYER,
*U. S. Comr., S. D. O.*

And afterwards, to-wit, on the 25th day of October, A. D. 1902, the following Entry was made upon the Journal of said court clothed in the words and figures following, to-wit:

*Entry Allowing Appeal.*

This day came Winfield S. Gregg, intervening petitioner herein, in open court, and at the same term at which the decree appealed from was entered, and presented his petition for an appeal and assignment of error, and, the court having examined the same and finding them to be in all respects regular and in accordance with law,, it is ordered that the prayer of said petitioner be granted and the appeal of Winfield S. Gregg from this court to the Circuit Court of Appeals for the Sixth Circuit be, and the same is hereby, allowed as prayed for, and bond is fixed in the sum of $500.00.

And it appearing to the court that the appeal has been prayed for and allowed in open court, and at the same term at which the decree and orders of the court complained of were entered, it is further ordered that a citaiton to the
365 parties hereto be dispensed with on the perfecting of said appeal within the present term of this court.

And thereupon came said Winfield S. Gregg and presented his bond and sureties, and the court having examined the same and found said bond to be in all respects regular and in accordance with law, it is ordered that the same be, and it is hereby, approved as the bond in said appeal of Wnifield S. Gregg.

UNITED STATES OF AMERICA,
*Southern District of Ohio, Eastern Division,* } *ss*:

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause in relation to Winfield S. Gregg, as the same appears of record in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Columbus, Ohio, this 31st day of October, A. D. 1902.

[SEAL.] R. R. COWEN, *Clerk.*
By ROBERT C. GEORGI, *Deputy Clerk.*

And afterward, to wit, on the 25th day of October, A. D., the following Waiver of Citation was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Waiver of Citation.*

Consolidated causes.

MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, Defendant, } No. 816.

METROPOLITAN TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, Defendant. } No. 887.

366 We, the undersigned, respectfully waive the issuing and service of citation for and upon us in the appeal of Winfield S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit and waive further notice of said appeal and respectfully enter our appearance thereto.

PARSONS, SHEPHARD & OGDEN,
*Solicitors for Metropolitan Trust Co.*

And afterwards, to wit, on the 27th day of October, A. D. 1902, the following Waiver of Service was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Waiver of Service of Mercantile Trust Company and of Receiver.*

Consolidated Causes.

MERCANTILE TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILRO[illegible] Company, Defendant. } No. 816.

METROPOLITAN TRUST COMPANY, TRUSTEE, Complainant,
*vs.*
THE COLUMBUS, SANDUSKY & HOCKING RAILROAD Company, Defendant. } No. 887.

We, the undersigned, respectfully waive the issuing and service of citation for and upon us in the appeal of Winfield

S. Gregg in the above entitled action in the United States Circuit Court of Appeals for the Sixth Circuit and waive further notice of said appeal and respectfully enter our appearance thereto.

ALEXANDER & GREEN,
*Solicitors for Mercantile Trust Co.*
LAWRENCE MAXWELL, JR.,
*Counsel for Joseph Robinson, Receiver.*

367 And afterwards towit on November 5th, 1903, præcipe for appearance of counsel wad filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

WINFIELD S. GREGG
*vs.*
METROPOLITAN TRUST CO. } No. 1162.

Frank O. Loveland, clerk of said court:
Please enter my appearance as counsel for the appellant.
HARLAN CLEVELAND.

368 And afterwards towit on April, 9th, 1903, and order of continuance was entered in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

WINFIELD S. GREGG
*vs.*
METROPOLITAN TRUST CO. } #1162.

This cause is continued to the May session of this court.

And afterwards towit on May 11th, 1903, an entry was made upon the journal of said court which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

WINFIELD S. GREGG
*vs.*
METROPOLITAN TRUST CO.

This cause is argued for the appellant by Mr. Harlan Cleveland and for appellee by Mr. Morrison R. Waite and Mr. Herbert Parsons and is submitted. A motion by appellant for a writ of certiorari for diminution of the record directed to the circuit court of the United States for the southern district of Ohio is granted.

369 And afterwards, to-wit, on the 12th day of May A. D. 1903 stipulation for writ of error was filed, clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals, Sixth Circuit.

WINFIELD S. GREGG, Appellant,
*vs.*
METROPOLITAN TRUST COMPANY ET AL., Appellees. } 1162. Memorandum.

Attached hereto the court will find a copy of the stipulation entered into between the parties, setting forth the facts as to the vouchers referred to on pages 16 and 18 of my brief. The parts of the record which refer to this matter are as follows:
Master's Report, pp. 267, 276, 277;
Merion's Exhibit B, pp. 297, 298;
Merion's evidence Q. 13, page 304.
Respectfully submitted.
(Signed) HARLAN CLEVELAND,
*Attorney for Appellant.*

370 United States Circuit Court of Appeals.

WINFIELD S. GREGG, Appellant,
*vs.*
METROPOLITAN TRUST CO. ET AL., Appellees. } #1162. Stipulation.

It is stipulated by the parties hereto that the opinions of Judges Clark and Thompson in the court below and printed at pages 14 to 20 inclusive of the brief of the appellees shall be deemed and treated by court and counsel as constituting part of the record as though included in the transcript and printed record. This stipulation is made for the purpose of obviating the necessity of applying for a certiorari in diminution of the record on that and following points.

It is further stipulated that the vouchers referred to on page 297 of the printed record in "Merion's Exhibit B" as follows:

| | |
|---|---|
| "12-31-96 vouchers paid | $27,075.00 |
| 1- 9-97 vouchers paid | 6.494.44" |

were made up as follows:

| | |
|---|---|
| Dec. 31, 1896. Vouchers paid | 27,075.00 |
| Made up as follows: | |
| Two and one-half per cent. commission paid to Hatch & Foote on the $30,000.00 loan, being a part of said $40,000 of Dec. 26 | 750.00 |

371

| | |
|---|---|
| Six months' interest on $250,000 of the Monsarrat receivership certificates..... | 7,500.00 |
| Six months' interest on $250,000 of the Monsarrat receivership certificates. .... | 7,500.00 |
| Paid Zanesville Terminal & Railway Co. amount due Dec. 31, 1896 for terminal switching, and interest on guaranteed bonds of $453,000 at 5 per cent..... | 11,325.00 |
| | $27,075.00 |

Jan. 9, 1897. Vouchers paid was a voucher for said amount under date of Jan. 9, 1897, paid to Wheeling & Lake Erie Ry. Co. on acc't of rental of tracks between Bellevue and Toledo from Jan. 11, 1897, to March 31, 1897, at $29,225 per annum $6,494.44..... $6,494.44

The appellees do not hereby admit that the $40,000.00 borrowed from the Guaranty Trust Co. was borrowed for the purpose of making said payments nor does the appellant admit that it was not.

It is further stipulated that the bonds of the defendant railroad company referred to in Merion's Exhibit B as issued as collateral security for the four notes of $40,000.00, $41,000.00, and $41,000.00 and $5,000.00 respectively, being 190 first mortgage bonds, were outstanding obligations of the defendant railroad company at the time of the appointment of S. M. Felton receiver in the court below, never having been redeemed from said loans by said railroad company and shared equally with other first mortgage bonds in the
372 distribution of the proceeds of the sale of the road so far made.

(Signed) HARLAN CLEVELAND,
*For Appellant.*
ALEXANDER & GREEN,
PARSON, SHEPARD & OGDEN,
*Sol'rs for Appellees.*
MOR-ISON R. WAITE.
LAWRENCE MAXWELL, JR.

Cincinnati, May 11, 1903.

373 And afterwards towit on July 7th, 1903, a decree was entered in said cause which reads and is as follows:

*Decree.*

374 United States Circuit Court of Appeals for the Sixth Circuit.

WINFIELD S. GREGG
*vs.*
METROPOLITAN TRUST CO. } No. 1162.

Appeal from the circuit court of the United States for the southern district of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause be and the same is hereby affirmed with costs.

375 And afterwards to wit on July 12th, 1903 an opinion was filed in said cause which is in the words and figures as follows:

*Opinion.*

376 United States Circuit Court of Appeals, Sixth Circuit.

WINFIELD S. GREGG, Appellant,
*vs.*
METROPOLITAN TRUST CO. ET ALS., Appellees. } No. 1162. Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Submitted May 11, 1903; decided July 7, 1903.

Before Lurton, Severens, and Richards, circuit judges.

This is a second appeal. In the former case we decided that preferential six months' claimants had no preference over mortgagees in the proceeds of the corpus of the mortgaged railroad property unless there had been a diversion of the current earnings which the mortgagees should equitably restore, and that the burden was upon such claimants to show such diversion.

We reversed the former decree, denying a preference to Gregg and certain other claimants who had established debts entitled to preference of payment out of current income, upon the ground, that the master in reporting that there had been no diversion of income during the six months preceding the receivership had erred in treating car trust debts as debts of the income and properly payable out of current income, and remanded the case for a re-reference with

leave to take further evidence. Gregg *v.* Mercantile Trust Co., 109 F. R. 220. The master has again reported that there was no diversion for which the mortgagees could be made accountable. Exceptions by appellant were overruled and preference again denied to the appellant.

From this decree an appeal has been prosecuted.

LURTON, circuit judge, after making the foregoing statement of the case, delivered the opinion of the court.

Filed Jul- 18, 1903. Frank O. Loveland, clerk.

377 The proceeds of the sale of the mortgaged property is insufficient to pay the mortgage debts, and if the appellant is to be paid at all he must be paid at the expense of the mortgage creditors out of the proceeds of the sale of the mortgaged property.

Before the mortgage creditors can be displaced in respect of the corpus of the property it must appear that the current earnings which accrued during the period shortly before the receivership were not applied to the payment of current operating expenses, incurred within the same period, but were used in the permanent improvement of the property mortgaged or for the payment of the mortgage debt, and that as consequence of this misapplication current expense creditors have been disappointed. This is the well-settled rule in respect of the payment of these so-called preferential debts of the income. Central Trust Co. *v.* East Tenn. V. & G. Ry. Co., 26 C. C. A. 30; International Trust Co. *v.* Townsend Brick Co., 37 C. C. A. 396; Rhode Island Locomotive Works *v.* Continental Trust Co., 47 C. C. A. 147.

This was the law as declared in the opinion upon the former appeal and as such is the law of the case. Gregg *v.* Mercantile Trust Co., 109 F. R. 220, 227.

For the sole purpose of permitting certain creditors of the income to establish, if they could, that there had been a diversion of current earnings by which the mortgagee had profited, and the extent of such diversion, we remanded this case that additional evidence might be heard by the special master and a report made. Upon this second reference the master reported that during the six months next preceding the appointment of a receiver claims aggregating $99,215.49 had been paid by the railroad company which had inured to the benefit of the mortgage creditors. The items were as follows:

| | |
|---|---|
| Car trust notes | $88,209.31 |
| Interest on bonds | 5,504.53 |
| Sidings | 3,045.45 |
| Land purchased | 2,257.20 |
| | $99,215.49 |

The appellant excepted because he did not report two other items which he claimed were of like character, viz:

| | | |
|---|---|---|
| 378 | For car couplers to replace couplers in use, to comply with act of Congress | $2,712.54 |
| | Expenditure on union depot viaduct | 442.44 |

The master did not report the aggregate earnings during that period, and it is not possible, from the report alone, to know whether the gross current earnings of the company were sufficient, if properly applied, to have paid the current operating expenses, and leave a net income which was sufficient to have authorized the expenditure for permanent improvements and equipment and the payment of interest upon the mortgage debt shown to have been made during that period. But the master also reported that during the same period of time the company received from sources other than current earnings the following amounts:

| | |
|---|---|
| Money borrowed | $127,781.25 |
| Money collected from sale of mileage books | 98,712.54 |
| Old earnings collected (not current) | 2,148.47 |
| | $228,642.26 |

But if it be assumed that the gross earnings were insufficient to pay current operating expenses and leave a surplus which might be properly applied to the permanent improvement of the property and interest upon the mortgage debt, then the master has reported that gross earnings were more than reimbursed by the money derived from other sources. In Central Trust Co. *v.* East Tenn. V. & G. Rd., 26 C. C. A. 30, 32, it was shown that during the period covered by the creation of the preferential claims under consideration that the net earnings were insufficient to justify the payment of interest on the mortgage debts and to make certain improvements which had been made.

In determining whether a case had thereby been made for compelling a restoration by the mortgagees, this court said:

"But it is also shown that, during the same period, money was borrowed on open account, more than sufficient to equal the diversion complained of, which went into a common treasury from which operating expenses, preferential claims, interest, and improvements were paid, without any definite showing as to whether the borrowed money was applied to the payment of interest and improve-
379 ments, or to current income debts. Under this system of book-keeping, the addition of borrowed money to the income arising from operation showed a substantial surplus after payment of the great mass of income debts, and all disbursements on account of interest upon the two mortgages foreclosed, as well as upon improvements in the roadway. Prior to the period covered by the

maturity of appellant's claims, there was a surplus of gross earnings over all operating expenses; but it can not be contended that the company was under any obligation to future creditors to accumulate a surplus to meet possible deficiencies in the income to meet future income debts, or that it was improper to apply such surplus in payment of interest. St. Louis, A. & T. H. R. Co. *v.* Cleveland, C., C. & I. Ry. Co., 125 U. S. 658–675, 8 Sup. Ct., 1011. Whatever diversion there may have been of income to payment of debts or liabilities, not properly debts of the income, seems to have been more than reimbursed by the money borrowed. The burden is upon complainants to show that there has been a misappropriation of earnings to the improvement of the mortgaged property, or to the payment of interest, before the mortgagees can be justly called upon to reimburse the fund applicable to debts of the income in consequence of such diversion. If interest was paid or improvements made out of borrowed money, then there was no diversion; or if made out of gross earnings, and the latter was reimbursed by borrowed money, the diversion was made good. The abstracts showing income from all sources and disbursements upon all accounts are somewhat complicated, in consequence of the mode of bookkeeping adopted. The commissioner and court below concurred in reporting that here was no diversion shown. In the absence of the very cogent evidence of mistake of fact, or of some error of law, the finding of fact by the commissioner must be accepted as final. Emil Kiewert Co. *v.* Juneau, 24 C. C. A. 294; 78 F. R. 708; Kimberly *v.* Arms, 129 U. S. 512–524, 9 Sup. Ct. 355; Tilghman *v.* Proctor, 125 U. S. 136, 8 Sup. Ct. 894; Turley *v.* Turley, 85 Tenn. 256, 1 S. W. 891."

In reversing this case upon the former appeal we affirmed what has been said in the case cited, and in directing a reference we said:

"It is said, in support of the report, that money was received from the sale of bonds, and from sources other than current earnings, which more than made good any income applied to contract obligations. If that is true, the appellant cannot complain." 109 F. R. 220, 227.

But it is contended that no such reimbursement of "gross earnings" has been shown in this case as was shown in the case cited above. To make the distinction the appellant excepted to
380 the item of $127,781.35, money borrowed as a reimbursement of the gross earnings fund because only $430.17 of the money so borrowed was in fact paid into the "common treasury," the remainder being paid out upon certain specific debts of the company without reaching the treasury.

He also excepted to the item of $98,712.54 realized from the sale of mileage on account of other railroads and not accounted for to them upon the ground that this was not money derived from a source other than current earnings and should have been so treated.

First as to the money borrowed during the period under inquiry:

The master reports that this was money borrowed from banks on the promissory notes of the company at different dates and secured by first mortgage bonds of the company deposited as collateral security. By a stipulation filed in this court it is agreed that these notes were never paid and that the bonds constitute a part of the bonds secured by the mortgage herein foreclosed, and that these bonds will share equally with the other bonds secured by the mortgage, which appellants seek to displace. Thus this so-called borrowed money has been in effect contributed by the mortgagees against whom appellant asks equitable relief. This borrowed money is shown to have been checked out for the following purposes:

| | |
|---|---|
| To pay car trust notes | $22,629.83 |
| To the payment of current pay roll | 70,370.17 |
| Upon general debts of the company not beneficial to the bondholders and not current operating expenses entitled to preferential payment | 33,569.44 |
| To the treasury of the company | 430.17 |
| | $126,999.61 |

The item of $22,629.83 was used in payment of car trust notes constituting part of the $88,208.31 charged in the report as a diversion. It is very plain that the alleged diversion must be cut down to this extent for, to that extent, it is demonstrated that there was no misapplication of the fund arising from current operating receipts, which is the only fund chargeable in equity with current expense debts. If we deduct this amount from the reported aggregate of apparent or possible diversions we have $76,585.66 as the sum which has been paid out to the mortgage creditors or for their benefit.

381 But it is further shown that of this money raised at the direct expense of the mortgage creditors, $70,370.17 was paid in reduction of existing current expense claims, viz: labor claims constituting current pay-rolls.

If the right of the creditors of the class to which Gregg belongs to displace prior fixed liens be a purely equitable right bottomed upon the theory that the mortgagee has received something which he cannot equitably retain, it would seem most inequitable that the payment of current labor claims by money borrowed through an enlargement of the mortgage debt should be disregarded in the adjustment of the equities of the two classes of creditors solely because the money so borrowed is shown to have been directly applied to their payment without first having been paid into what is figuratively called "the common treasury."

But for this payment of the current pay-rolls with money in effect contributed by the mortgage creditors the unpaid debts of the income would now be $70,000.00 greater than they are. That such

payments did not directly profit Gregg, as his debt is still unpaid, is no answer.

We must deal with the creditors of the income and the creditors by mortgage, for the purpose of such a proceeding as this, as constituting two classes of creditors. It is only upon this plan that Gregg has any standing whatever, for his debt was created during the month immediately preceding the receivership and was not payable until after the date of the appointment of the receiver. If his rights are to be dealt with separately and apart from other creditors of his class he would have no standing, for there is no pretense of a diversion after his debt was made and before the appointment of the receiver.

We must also treat "gross earnings" for the period of six months preceding the receivership as a single fund and all debts made for current operating expenses during that time as equally payable out of that fund before any part of it is justly applicable for other purposes. But if we do this we must also regard all contributions made to that fund, during the same period, from sources other than income from operation, as a reimbursement *pro tanto* on account of payments therefrom either for permanent improvements or mortgage interest. The remainder of the borrowed money was paid out upon general debts, debts which were not debts of the income nor of advantage to the mortgage creditor.

Now it is conceded that if this borrowed money had been paid into what is called the "common treasury" of the company
382 and then paid out in usual course, that the gross earnings fund would thereby have been reimbursed and the case brought precisely within the facts of St. Louis, &c., R. Co. *v.* Cleveland, &c., Ry. Co., 125 U. S. 658, 675, and Central Trust Co. *v.* East Tenn. V. & G. R. Co., 26 C. C. A., 30, 32.

But what is the "common treasury"?

Money which is subject to the disposition of the financial agents of the company may be said to be money in the common treasury, although it may be in different banks and arise from many sources. There is no evidence of any special method of keeping the funds, and the proceeds of these discounted notes seem to have been passed to the general credit of the company in the bank making the discount and then checked out to pay such obligations as the company saw fit to pay.

The mere circumstance that the money is deposited to the credit of the company in one or several banks, if the deposits were alike subject to the checks of the company, is of no significance, for it is in the common treasury of the company in as full a sense as if but one account had been kept.

There is no evidence that any part of this money was borrowed to pay the particular debts to which it was in fact appropriated, and the fair inference is that the fact that the proceeds of these discounted notes *was* paid out upon particular debts was only accidental.

But it is said that the reimbursement of gross earnings improp-

erly applied to improvements or mortgage interest by money arising from other sources only operates to relieve the bondholders from liability to restore because the mingling of money arising from current earnings with such other money makes it impossible to say whether in fact current earnings have been misapplied, for it may be that the mortgage interest paid or the permanent improvements made were in fact paid from the fund which arose from such other sources. This fact that general debts to the extent of about $33,000.00 were paid out of borrowed money and not out of the "gross earnings fund" is a fact which does distinguish this case from the two cases in which that fund was held to be reimbursed by borrowed money, and is a fact of some significance in the administration of this equity in favor of preferential debts of the income, for it cannot be said that the gross earnings depleted in favor of the bondholders *has* thereby been made good.

We shall therefore ignore this item of $33,000.00 borrowed
383 money as not a reimbursement of the current earnings fund, because it was never in fact paid into that fund nor applied in easing that fund by the payment of claims which were an equitable charge thereon.

Excluding this part of the money borrowed the account between the two classes of creditors stands thus:

| | |
|---|---|
| Diversion reported by the master | $99,215.49 |
| Reimbursements of that fund: | |
| Borrowed money applied to pay car trust notes | 22,629.83 |
| Borrowed money applied to pay pay rolls | 70,370.17 |
| Old collections not current income | 2,148.47 |
| Borrowed money paid to company treasury | 430.15 |
| Total reimbursements | $95,578.62 |
| Balance of diversions | 3,636.87 |
| | $99,215.49 |

There however remains as an additional reimbursement the sum of $98,712.54, which was paid into the current income fund from the sale of mileage books sold on account of other railroads and not accounted for to them. This item was excepted to upon the ground that it did not represent money derived from a source other than current earnings. The exception was overruled, and it is now assigned as error.

The contention is, that this was in fact current earnings and should be treated and regarded as a fund primarily appropriated to the payment of current income debts. If this were conceded the result would be to enlarge the current income fund to that extent. If that fund was $98,712.54 larger than shown by its exclusion it may be that the gross earnings thus swelled would be large enough

to provide a fund sufficient to pay current operating expenses and leave a net income ample to make the improvements and pay the interest by which bondholders have profited.

To ascertain how this would leave the matter would require a recasting of the master's report for we have already referred to the fact that he has failed to report whether the gross earnings were insufficient to justify the payments which he has reported as diversions.

But we are of opinion that this item of receipts was properly reported as an extraordinary item not properly to be regarded as current income.

Mileage books were sold in bulk and at a discount to brokers
384 and others aggregating $128,000.00. These books represented mileage over the C. S. & H. Rd. Co., and other railroads for whom it acted in issuing such books. Of this $98,712.54 represented the price of mileage sold and collected on account of other railroads and as such constituted a part of the traffic balance due to such roads.

Concerning the transaction the master, who had all the witnesses and books before him, reports as follows:

"This money was never treated as current earnings by the accountants of the company. It was carried in a suspense account.

"The mileage books were sold at a discount (about $16.00 per book; price about $20.00). The transaction, apparently, amounted to the borrowing of that much money by the railroad company on the security of the mileage books, the money to be repaid in the future in the services of the C. S. & H. Railroad Company, by the carrying of passengers, or in similar services of other railroad companies who were to be reimbursed by the C. S. & H. Railroad Company for such services. Could a sale of bonds to raise money be distingushed, in principle, from such sale of mileage books—made in quantities to brokers and at such discounts as to preclude any probability that the transaction was a mere selling of tickets in the usual course of business?

"It appears to have been resorted to as a means of raising money, on the general credit of the railroad company after all ordinary means of doing so had been practically exhausted.

"The mileage books were promises to render services on presentation and sold as they were, in the way they were, in bulk and on the faith of the general credit of the railroad company, and it appears to this amount not accounted for, the proceeds seem distinguishable from earnings."

It is difficult to see why money derived from such a source should be regarded as ordinary current income, such as is primarily devoted to ordinary current operating expenses. By the transaction the company created a debt to each of the companies upon whose lines such mileage was sold.

The company itself did not regard it as current earnings and did not carry the income in that account.

Merion, the auditor, testified that the money thus raised was "paid out for anything we had to pay, it went direct to the treasurer."

Now it is evident that if these proceeds had been used to pay mortgage interest that the current operating expense creditors
385 could not complain, and equally evident that if the payments claimed to be diversions were paid out of the fund thus swelled, that that fund was thus reimbursed to the full extent of this fund from a source other than current income.

We see no error in the decree, and it is accordingly affirmed.

386 And afterwards towit on July 28th, a petition for rehearing was filed clothed in the words and figures as follows:

*Petition for Rehearing.*

387 United States Circuit Court of Appeals, Sixth Circuit.

WINFIELD S. GREGG, Appellant,
*versus*
METROPOLITAN TRUST CO. ET AL., Appellees. } No. 1162.

*Petition for Rehearing.*

Harlan Cleveland, George Hoadly, attorneys for appellant.

Filed Jul- 28 1903

FRANK O. LOVELAND, *Clerk.*

388 United States Circuit Court of Appeals, Sixth Circuit.

WINFIELD S. GREGG, Appellant,
*vs.*
METROPOLITAN TRUST CO. ET AL., Appellees. } No. 1162.

*Petition for Rehearing.*

It is with reluctance that we again bring this case to the attention of the court. Our reasons therefor are to prevent the case apparently deciding more than was involved, and as we believe was intended, and also to call the attention of the court to matters which have been apparently overlooked. This court, speaking through Judge Lurton in the opinion filed *filed* July 18th, 1903, said:

"There is no surplus income arising from the operation of the receiver applicable to the payment of this or any other debt, nor is it claimed that there was any diversion of income by the receiver by which the mortgage creditors profited upon which to found an equity against the bondholders."

And also:

"If his (Gregg's) rights are to be dealt with separately and
389 apart from other creditors of his class, he would have no standing, for there is no pretense of a diversion after his debt was made."

The court will find upon an examination of the record that there has been no adjudication of either of these questions, that they are still pending, and that at the time of the decree in this cause no inquiry had been made or determination reached as to what was the income during the receivership; whether there was a surplus of income; whether it had been diverted, or what had been done with it. All these questions have been specifically reserved and are still pending. On the contrary, the receiver's accounts had not been presented, but he was ordered to file the same and a reference of the accounts when filed was ordered. The final decree of confirmation and distribution of October 8th, 1902 (Rec., 355), contains this provision:

"It is further ordered that the receiver file as soon as he can conveniently do so his final report and account herein, including therein the current accumulated assets, accounts and all the resources of the said receiver turned over to the purchaser herein, his heirs or assigns under this decree. And that said final account and all prior accounts of said receiver and his predecessor, Samuel M. Felton, be on the filing of said final account referred to a special master hereinafter to be named, to examine and report to this court upon all questions as to the rights of the six months' claimants hereinafter named to have any net earnings of the receivership applied to the payment of their said claims."

The court will further find that a lien was reserved on the road to satisfy such claims in the event of the right being established (Rec., 346-347); and a part of the proceeds of sale, to the amount of $57,515.75, is also held, subject to the order of the court, by the trust companies, for the same purpose (Rec., 350).

The only issue on the question of income or diversion raised
390 in the record now before this court was as to the right of six months' claimants by reason of diversion of revenues *prior* to the receivership.

We therefore respectfully request the court to modify its opinion apparently adjudicating the question of *surplus income* or diversion during the receivership, in order that no question can arise thereon.

II.

In regard to the $98,712.54 paid into current income fund from the sale of mileage books of the C., S. & H. R. R. Co., and used on other roads, we venture to suggest to the court that if the proceeds of their mileage books were not "current earnings" in the strict sense of the words, because of the peculiar circumstances attending their sale, that then such proceeds were a trust fund, one evidence

of which is that they were carried in a suspense account, and could not be possibly treated as between the mortgage lienholders and the "six months' claimants" as a restoration of current earnings diverted. The relation of lender and borrower was never intended to be created by the railroad companies giving the C., S. & H. R. R. Co. power to issue interchangeable mileage, and when the latter company diverted the mileage tickets from their legitimate and contemplated use of sale in the regular course of business, by selling at a discount in quantities to raise money, it perpetrated a fraud on such other railroad companies, and a fraud of such a character as would have given to such railroad companies a special equity to follow the proceeds of the sale of such mileage books, and reclaim them from the treasury of the C., S. & H. R. R. Co., so long as they could be traced.

If this be true, it would seem anomalous that these railroad companies when they suffered by such breach of trust by the C., S. & H. R. R. Co., and by reason thereof became six months' claim-
391 ants for traffic balances resulting from this extraordinary issue of mileage books (Rec., 356), should have their equity based on a diversion of current earnings defeated, because of the sums received from this wrongful sale of mileage books, and that the mortgage lienholders should thus profit thereby. The amount of the claims depending by stipulation on the decision of this case is made up largely of traffic balances of other railroad companies thus created (Rec., 356, 255–257).

## III.

There is another question upon which the court has not passed covered by the sixth assignment of error (Rec., 360). It was presented to the court on the original appeal also (Rec., 200; Brief, in No. 858) and referred to in the oral argument in this case. Its not being before passed upon was immaterial, as that appeal was successful on other grounds, but in view of the decision on this appeal, thinking it may have been overlooked, we take the liberty of bringing it to the attention of the court. It is this:

The receiver was appointed June 2, 1897.

The stipulation between the parties shows that during the month of May, and on the 1st, 2d and 3d days of June, 1897, there were sold and delivered to the C., S. & H. R. R. Co. ties of the value of $4,709.53, payment for which would have been due on the 25th of June, 1897, and that an inventory taken by the receiver on the 10th of June, 1897, showed that of the ties so sold and delivered there were on hand upon said date ties to the amount and value of $3,200, which said receiver thereafter used in the operation and maintenance of said railroad as a going concern (Rec., 158.)

Upon these facts the appellant, Gregg, in any view of this case is entitled to be paid out of the proceeds of the sale prior to the mort-

gage bondholders the sum $3,200, being the value of the ties
392 on hand when the receiver made his inventory, which were sold and delivered a few weeks before and on the day preceding and following the appointment of the receiver, which the receiver used and which thus inured to the benefit of the bondholders.

The ground of this contention is that the purchase of said ties by said railroad company at a time when it was, as it knew, hopelessly insolvent and had no reasonable expectation of paying therefor, and after it had defaulted on the interest due upon its bonds was a fraudulent purchase which would have entitled Gregg, had the ties not been in the possession of the court, to have retaken them, and which would have entitled and justified the court to order their redelivery to him, or in default thereof, payment therefor.

It has been repeatedly held that the purchase of goods on credit, made with the intent on the part of the purchaser not to pay for them, is fraudulent, and if the purchaser has no reasonable expectation of being able to pay, such lack of reasonable expectation of ability to pay is equivalent to an intention not to pay, and entitles the vendor to retake the goods.

Donaldson, assignee, *v.* Farwell, 93 U. S., 631.
Talcott *v.* Henderson, 31 Ohio St., 162.
Jaffrey *v.* Brown, 29 F. R., 476.
Davis *v.* Stewart, 8 F. R., 803.
Wimot *v.* Lyon *et al.*, 49 Ohio St., 296.
Morrow, etc., *v.* New England Shoe Co., 57 F. R., 693.

While Mr. Gregg in this case could not, without the permission of the court, have taken the ties from the possession of the court, he, in his intervening petition, called attention to the fact that a large part of the ties had been used by the receiver, after his appointment, in the operation and maintenance of the rood. A special equity under the circumstances entirely apart from any question of diversion arose as to these $3,200 worth of ties. A court of equity
393 should reimburse him therefor under the circumstances.

The United States Supreme Court has repeatedly recognized special equities of this character entirely apart from any question of diversion.

St. L., etc., R. R. *v.* Cleveland, etc., Ry., 125 U. S., 658, 673.
Union Trust Co. *v.* Souther, 107 U. S., 598.
Morgan *v.* T. C. R. Co., 137 U. S., 171, 197.

We respectfully ask the court to reconsider its opinion in this case, and to make the necessary orders in that behalf.

HARLAN CLEVELAND,
GEORGE HOADLY,
*For Appellant.*

394 And afterwards to wit on November 7th, 1903, an order denying petition for rehearing and amending the opinion was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

WINFIELD S. GREGG
*vs.*
METROPOLITAN TRUST CO. } # 1162.

The petition for rehearing is hereby denied. The opinion of this court heretofore filed in this case is amended by striking out the last two lines on page 1 and lines 1, 2, 3, 4, 5 and 6 on page 2, and by inserting on page 6, at the end of paragraph 4 after the words "after his debt was made" the words "and before the appointment of the receiver."

395 United States Circuit Court of Appeals for the Sixth Circuit.

# 1162.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct certified transcript of the record in the case of Winfield S. Gregg *vs.* Metropolitan Trust Co. No. 1162, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 10th day of November A. D. 1903.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

396 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Being informed that there is now pending before you a suit in which Winfield S. Gregg, — appellant, and The Metropolitan Trust Company *et al.*, appellees, No. 1162, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of Ohio, and we, being willing for certain reasons that the said cause and the

record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
397 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of December, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance to the command of the foregoing writ of certiorari I now hereby certify that on the 21st day of December A. D. 1903, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

"United States Circuit Court of Appeals, Sixth Circuit.

WINFIELD S. GREGG, Appellant,
*vs.*
THE METROPOLITAN TRUST COMPANY ET AL., Appellees. } #1162. Stipulation.

The Supreme Court of the United States in the above entitled cause having on the seventh day of December, 1903, granted a writ of certiorari to the United States circuit court of appeals for the sixth circuit in the above entitled cause,

It is hereby stipulated that the certified transcript of the record filed in the office of the clerk of the Supreme Court of the United States on the petition for said writ of certiorari may be taken as a return to said writ of certiorari.

PARSONS, CLOSSON & McILVAINE,
*Solicitors for the Metropolitan Trust Co.*
ALEXANDER & GREEN,
*Solicitors for the Mercantile Trust Co.*
LAWRENCE MAXWELL, JR.,
*Solicitor for Joseph Robinson, Receiver.*
HARLAN CLEVELAND,
*Solicitor for W. S. Gregg, Appellant.*"

I further certify that the above is a true and correct copy of the said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said circuit court of appeals at the city of Cincinnati, in said circuit this 22nd day of December, A. D. 1903.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk United States Circuit Court of Appeals for the Sixth Circuit.*

398 [Endorsed:] File No. 19,133. Supreme Court of the United States. No. 482, October term, 1903. Winfield S. Gregg *vs.* Metropolitan Trust Co., *et al.* Writ of certiorari.

399 [Endorsed:] File No. 19,133. Supreme Court U.S. October term, 1904. Term No. 141. Winfield S. Gregg, petitioner, *vs.* The Metropolitan Trust Co., *et al.* Writ of certiorari and return. Filed Dec. 24", 1903.

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JAMES H. McKENNE

# Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 1482. 1141.

WINFIELD S. GREGG,
Appellant,

versus

THE METROPOLITAN TRUST COMPANY, MERCANTILE TRUST COMPANY and JOSEPH ROBINSON, Receiver of the Columbus, Sandusky & Hocking Railroad Company et al,
Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

THE COURT INDEX PRESS, Law Printers, 806 Main Street, Cincinnati, Ohio.

# Supreme Court of the United States.

**OCTOBER TERM, 1903.**

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No. ——.

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*WINFIELD S. GREGG,*

*Appellant,*

*vs.*

*METROPOLITAN TRUST COMPANY et al,*

*Appellees.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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*To the Supreme Court of the United States:*

The appellant respectfully prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit, and annexes hereto a statement of the case and his grounds for petition. He files printed copies of the record in the Circuit Court of Appeals and a certified copy of the transcript of the proceedings in that court.

HARLAN CLEVELAND,
*Of Counsel for the Petitioner.*

## STATEMENT OF THE CASE.

In a suit to foreclose a first and second mortgage on the Columbus, Sandusky & Hocking Railroad Company W. S. Gregg was an intervening petitioner to the amount of $6,804.49, for ties and other current supplies furnished the railroad for its maintenance and operation from day to day as a going concern (Record, 158, 160).

A receiver was appointed in the foreclosure suit on the 2d day of June, 1897, and most of the supplies referred to had been furnished in the month of May, 1897, and on the 1st, 2d and 3d days of June, 1897. When the receiver took his inventory on the 10th of June, 1897, $3,200.00 worth of these supplies were found to be on hand.

The claim was presented to and allowed by the Circuit Court as a *six months' supply claim* within the terms of the order originally appointing the receiver, but so far as it was sought to have the same declared a lien on the *corpus* of the property and paid out of the proceeds of the sale thereof it was disallowed; also, so far as it was sought to have the same declared a lien on the *corpus* of the property to the extent of $3,200.00 by reason of the supplies to that amount having been purchased at a time when the railroad company knew it was insolvent, and had no intention of paying therefor, which supplies had come into the hands of the receiver and had been used by him for the benefit of the property, it was likewise disallowed.

On appeal to the United States Circuit Court of Appeals (*Gregg* v. *Mercantile Trust Co. et al*, 109 Fed., 220), the decree was reversed upon a question as to whether or not there had been a diversion or restoration of current earnings.

The Circuit Court finding that there had been a diversion of earnings, but a restoration thereof sufficient to make good the diversion, again dismissed the claim so far as it was sought to have payment thereof from the *corpus*

of the property, or so far as the special equity was claimed, to the amount of $3,200.00.

The Circuit Court of Appeals affirmed this decree, and reiterated its prior decision, in which it had held—

"That preference could be given to such claims only out of the income of the mortgaged railroad, and that mortgages upon the *corpus* could only be displaced by such creditors when it was shown that there had been a diversion of the income either before or after the receivership by which the mortgagees had profited" (*Gregg* v. *Mercantile Trust Co.*, 109 F. R., 220, 227).

I.

The Circuit Court of Appeals for the Sixth Circuit, in so deciding, was in irreconcilable conflict with its prior decisions, and with the Circuit Courts of Appeals for the First, Fourth, Eighth and Ninth Circuits.

(1). It had first formulated the doctrine applicable to such claims in *Central Trust Co.* v. *East Tennessee, V. & G. R. Co.*, 80 Fed., 624, where it had said (page 626):

"But, independently of any diversion of current income, there is a class of debts, incurred in maintaining the operation of a railway, which, under special circumstances, and subject to very positive limitations, has been held to outrank, in priority of payment, contract liens."

And after discussing

*Miltenberger* v. *Railway Co.*, 106 U. S., 286–311;
*Burnham* v. *Bowen*, 111 U. S., 776–781;
*Kneeland* v. *Trust Co.*, 136 U. S., 89–97;
*Thomas* v. *Car Co.*, 149 U. S., 94–117,

had summarized the law as follows:

"From these cases it may be deduced that in respect of railroad mortgages there is an implied agreement that all proper operating expenses of such companies, while under control of the mortgagors, are to be paid out of current receipts, and that any diversion of such income by which

current operating expenses are left unpaid is a misappropriation of the income, and upon a proper showing the mortgagees receiving the benefit will be required to reimburse the fund applicable to the payment of these 'debts of the income' to the extent of the diversion. It may further be deduced that, *independently of any diversion*, the necessary operating expenses of a mortgaged railroad, constituting a first charge upon the income while under the control of the mortgagor, will continue to be a charge upon the income under a receivership, *and, if necessary, upon the corpus of the property.* This latter equity is supposed to arise from the nature of the public duties resting upon such companies, and upon the necessity of such expenditures in preserving the property as a going concern for the ultimate benefit of the mortgage creditors." [Italics ours].

Despite this decision, which was rendered in 1897, the same court, in 1899, while the case at bar was pending in that court, said, in *International Trust Co.* v. *Townsend Brick & Contr'g Co.*, 95 Fed., 850 (page 860) :

"The power of the court to displace mortgage liens in favor of such unsecured debts of the mortgagor *depends upon the fact that the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgage*, and the extent to which the *corpus* of the mortgaged property can be called upon to pay such debts of the income is limited by the amount of the diversion." [Italics ours].

In *Rhode Island Locomotive Works* v. *Continental Trust Co.*, 108 Fed., 5, 7, this general rule was again stated.

In both of these cases, however, the claims seeking priority were held not to be "current supply claims" or "debts of the income." The two decisions, at total variance with the prior case, were purely *obiter* in reference to the question whether the claims were payable out of the proceeds of the sale of the mortgaged property. For, in the first case, the bridge, for the payment of which priority was sought, was decided to be a permanent betterment; and in the second case, the locomotives, for which payment

was sought, were found to have been purchased on the general credit of the company, and not in the expectation of being paid for out of current earnings.

But on the first appeal of the case at bar (*Gregg* v. *Mercantile Trust Co.*, 109 Fed., 220), while the claim was found to be one for current operating expenses absolutely necessary to enable the railroad to continue as "a going concern," and "in every respect a highly meritorious one," the court followed its *dicta* in the last two cases, contrary to its prior decision in 1897, although it declared (page 229):

"We are aware of the fact that in maintaining the necessity for evidence of diversion of income before allowing solemn mortgage securities to be displaced we are in disagreement with other courts of appeal, for whose judgment we entertain very great respect. Believing, as we do, that we have correctly interpreted the opinions of the Supreme Court, and that the limitations which have been placed upon the preferential character of unsecured operating debts are in accord with settled principles of justice, we shall adhere to the views we entertain until the Supreme Court shall otherwise adjudicate."

(2). The circuit courts of appeals referred to in this statement are as follows:

*First Circuit.*—

In the Circuit Court of Appeals for the First Circuit, in the case of *New England R. R. Co.* v. *Carnegie Steel Co.*, 75 Fed., 54, Judge Putnam said, pages 58, 59:

"The petition sets out no special circumstances to distinguish the claim from an ordinary current supply bill, or to entitle it to a lien on the *corpus* of the mortgaged property. It states enough, in connection with what we have already explained, to entitle it to the usual order for payment by the receivers, and consequently by the purchasers referred to. Therefore, as it ranked only as an ordinary current supply bill, could the court give it priority over the mortgage in question on the *corpus* of that portion of the property as to which the corporation had absolutely parted with all power of disposal except subject to the

mortgagee's title? Whatever might be our decision if the case was of novel impression, we think we are concluded by *Miltenberger* v. *Railway Co.*, 106 U. S., 286, 292, 293, 295, 298, 302, 304, 308, 311, as explained, and perhaps limited, in *Kneeland* v. *Trust Co.*, 136 U. S., 89, 96, 97; *Thomas* v. *Car Co.*, 149 U. S., 95, 110, 112; *Bound* v. *Railway Co.*, 7 C. C. A., 322, 58 Fed., 473, 480, and *Finance Company of Pennsylvania* v. *Charleston, C. & C. R. Co*, 10 C. C. A., 323, 62 Fed., 205, 208. We are therefore required to hold that the circuit court had the power to give the priority complained of to supply bills of the character, contracted at the time and remaining unpaid, under the circumstances shown in reference to those now at issue. What would have been the conclusion if the trustees of the second mortgage had not asked for a receiver and had not submitted to the order of September 8, 1894, modifying to some extent the then existing receivership, and thus giving it retroactive effect as of the time of its original creation, we need not determine. So far as we have discovered, *Miltenberger* v. *Railway Co.* is the only instance in which the Supreme Court has in fact allowed accrued supply bills a priority against the *corpus* of mortgaged property; and, as we understand that suit, the circumstances of the case at bar in its final stages are substantially the same for our present purposes, and we have followed strictly its conclusions without going beyond them."

This case affirmed the lower court, which had held in *Wood* v. *New York & N. E. R. R. Co.*, 70 Fed., pp. 741, 743—

*"that independently of the question of diversion, debts may be preferred which are incurred for labor and supplies necessary to keep the road a going concern from day to day, or which are the outcome of indispensable business relations, a continuance of which involves the interests of the public and the traffic of the road."* [Italics ours].

*Fourth Circuit.*—

In the Circuit Court of Appeals for the Fourth Circuit, in the case of *Finance Co.* v. *Charleston, C. & C. R. Co.*, 62 Fed., 205—where it affirmatively appeared that the earnings of the railroad company were never sufficient to pay operating expenses—it had been held, speaking through Mr. Justice Fuller:

"It must be regarded as settled that a court of equity may make it a condition of the issue of an order for the appointment of a receiver of a railroad company that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver or from the proceeds of sale; that preferential payments may be directed of unpaid debts for operating expenses, accrued within ninety days, and of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, in view of the interests both of the property and the public, that the property may be preserved and disposed of as a going concern and the company's public duties discharged; and that *such indebtedness may be given priority, notwithstanding there may have been no diversion of income*, or that the order for payment was not made at the time and as a condition of the receiver's appointment, the necessity and propriety of making it depending upon the facts and circumstances of the particular case and the character of the claims (*Miltenberger* v. *Railroad Co.*, 106 U. S., 286, 311; *Trust Co.* v. *Souther*, 107 U. S., 591, 594; *Union Trust Co.* v. *Illinois M. Ry. Co.*, 117 U. S., 434; *Morgan's L. & T. Railroad & Steamship Co.* v. *Texas Cent. Ry. Co.*, 137 U. S., 171; *Kneeland* v. *Foundry Works*, 140 U. S., 592). Of course the discretion to enter such orders should be exercised with great care, but as late as *Thomas* v. *Car Co.*, 149 U. S., 95, 110, the Supreme Court quoted the remarks upon the doctrine and its proper application in *Miltenberger* v. *Railroad Co.*, *supra*, with approval, although, as observed by this court in *Bound* v. *Railway Co.*, 58 Fed., 473, 7 C. C. A., 322, the tendency of that case was to narrow the limits within which an equity court should confine itself in making such allowances." [Italics ours].

In the case at bar it was a provision of the order appointing the receiver, made at the instance of the trustee of the first mortgage, that the six months' claims be paid (Record, 24–25), and some of them were paid (Record, 30, 35).

*Eighth Circuit*—

In the Circuit Court of Appeals for the Eighth Circuit, in the case of *St. Louis Trust Co.* v. *Riley*, 70 Fed., 32, the court said (pages 36, 37):

"From this brief review of the decisions of the Supreme Court bearing upon this question, we think these propositions may properly be deduced:

"First. There are certain claims against a mortgaged railroad company, accruing before the appointment of a receiver, which are entitled to preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership and out of the proceeds of the sale of its property.

"Second. It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mortgagor which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee.

"Third. Claims of this character have been given a preference over the mortgage debt by these decisions on one of two grounds—either on the ground that the mortgage is a lien on the net, and not on the gross, income of the railway company, and where that part of the income that is applicable to the payment of current expenses of operation, proper equipment and necessary improvements has been diverted to pay interest on the mortgage debt or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the earnings of the diverted fund by taking an equal amount from the railway company during the receivership and applying it to the payment of these claims in preference to the mortgage debt (*Fosdick* v. *Schall*, *Burnham* v. *Bowen*, *St. Louis, A. & T. H. R. Co.* v. *Cleveland, C., C. & I. Ry. Co.*, *Railroad Co.* v. *Hamilton*, *Morgan's L. & T. R. S. S. Co.* v. *Texas Cent. Ry. Co.*, *supra*); *or on the ground that the payment of the claims is necessary to preserve the mortgaged railroad, and to keep it a going concern.* It is indespensable that the operation of a railroad be uninterrupted in order that the travel and traffic of the public may be accommodated, and in order that the franchises of the railroad company may be preserved from forfeiture. Hence, the wages of employes, who might otherwise cease from their work; the amounts due to connecting lines of railroad that might otherwise cease their business relations with the managers of the mortgaged property, *and the claims for supplies and materials necessary to keep the mortgaged railroad a going concern, may, in proper cases, be paid out of the earnings during the receivership, or out of the*

*proceeds of the sale of the mortgaged property, in preference to the mortgage debt.*" [Italics ours].

And in *Central Trust Co.* v. *Clark*, 81 Fed., 269, the same court said, in reference to this class of cases (page 271):

"It thus appears that within less than thirty days after the gear wheel and pinion had been delivered by the Midvale Steel Company and placed in operation, the railway company mortgaged the property so acquired, along with its other property, and used the proceeds of the mortgage to meet its interest obligations to the first and second mortgage bondholders. In view of these facts, we think, as before stated, that the intervenor's claim was of such a nature that a court of equity having in charge the administration of the fund realized by the sale of the mortgaged property was fully justified in according it a preference, and in directing its payment before any distribution of the proceeds of the sale was made among the mortgage bondholders. The circumstances under which the indebtedness in controversy was contracted were such as to bring the case fully within the doctrine which was stated by this court, after a full review of all the decisions, in *Trust Co.* v. *Riley*, 36 U. S. App., 100, 16 C. C. A., 610, and 70 Fed., 32, namely, that in a suit brought to foreclose a mortgage lien upon the property of a *quasi* public corporation, it is competent for a court of equity to award a preference to a claim for property supplied or services rendered to such corporation, when it appears that the property so supplied or the services rendered were necessary to enable the company to discharge its public obligations and remain a going concern, and when it is evident that the property or services in question enhanced the value of the mortgaged property, and thereby inured to the benefit of the mortgagees."

*Ninth Circuit*—

In the Circuit Court of Appeals for the Ninth Circuit, in the case of *New York Guaranty & Indem. Co.* v. *Tacoma Ry. & M. Co.*, 83 Fed., 365, the court said (pages 369, 370):

"The question here is not so much whether the cable involved in this claim for preference is to be regarded in

the light of repairs, or for construction, or as an improvement, or in the nature of materials or supplies furnished; but it depends upon the inquiry whether or not it was necessary to keep the road 'a going concern,' within the meaning of this expression as it is used by the Supreme Court in the cases cited above.

"It is further contended that the claim in question is in the nature of a claim for repairs and improvements, and that, to make out a case for preference, there must have been some diversion of income, which otherwise would have been applied, or was properly applicable, towards the payment of the claim, to payment of bonded interest, or otherwise to the benefit of the security (citing *Farmers Loan & Trust Co.* v. *Northern Pac. R. Co.*, 68 Fed., 36, 37). But, to use the language of Judge Caldwell, in *Farmers Loan & Trust Co.* v. *Kansas City, W. & N. W. R. Co.*, 53 Fed., 182–189:

"'And it is error to suppose that such debts can only be given priority where there has been a diversion of the income of the road. Nor is it true that they can only be paid out of the earnings of the road, and can not be made a charge on the *corpus* of the property. A diversion of the income is not essential to give them priority, and they may be made a charge on the *corpus* of the estate if the earnings are not sufficient to pay them (citing *Miltenberger* v. *Railway Co.*, 106 U. S., 286–311, 312; *Union Trust Co.* v. *Illinois M. Ry. Co.*, 117 U. S., 434–457; *Thomas* v. *Railway Co.*, 36 Fed., 808'").

## II.

This court has in two cases distinctly recognized the same principle, namely, that a diversion of earnings is not a condition precedent to the payment of current operating expenses out of the *corpus* of the property.

*Miltenberger* v. *Logansport Railway Co.*, 106 U. S., 286.

This case was cited approvingly in *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S., 434. In that case wages due employes of the railroad within six months immediate-

ly preceding the appointment of the receiver were allowed priority out of the *corpus* of the property (see page 465).

It does not affirmatively appear whether there had been any diversion of earnings by the company in favor of the bondholders; but there is no allusion to that fact as necessary to the granting of a lien upon the *corpus* of the property, although there is a discussion of the diversion of a portion of the income of the receivership to "betterments" upon the property, which necessitated the issuance of receiver's certificates charged upon the *corpus* to make good this diversion of earnings, as the operating expenses of the receivership were greater in amount than the sum thus diverted, and a portion thereof remained unpaid (see pages 462–3). That there was no final diversion of earnings during the receivership is shown by charging a portion of the receiver's operating expenses upon the *corpus*, after the diversion for betterments had been provided for (see pages 464–5).

This court has never refused to pay supply claimants out of the *corpus*, on the ground that there has been no diversion of earnings; and has never formulated any such doctrine; nor have its decisions been construed as formulating any such doctrine except by the Circuit Court of Appeals for the Sixth Circuit. Four other courts of equal jurisdiction have interpreted its decisions as being quite the contrary.

The only cases in this court in which a charge against the *corpus* of the property has been denied are the following:

*Fosdick* v. *Schall*, 99 U. S., 235.
*Huidekoper* v. *Locomotive Works*, 99 U. S., 258.
*Penn* v. *Calhoun*, 121 U. S., 251.
*St. Louis, etc., R. R.* v. *Cleveland, etc., R. R.*, 125 U. S., 658.
*Kneeland* v. *Amer. Loan Co.*, 136 U. S., 89.
*Morgan's Co.* v. *Texas Central Ry.*, 137 U. S., 171.

*Louisville, etc., Railroad Co.* v. *Wilson*, 138 U. S., 501.
*Thomas* v. *Western Car Co.*, 149 U. S., 95.

None of these cases involved claims for supplies furnished or labor rendered to a railroad company necessary to maintain the railroad from day to day as a going concern.

*Fosdick* v. *Schall*, *Huidekoper* v. *Locomotive Works*, *Kneeland* v. *American Loan Co.* and *Thomas* v. *Western Car Co.* were all cases on leasing of rolling stock. The principle upon which all the rolling stock cases are decided is that the conditional vendor, having retained a lien upon particular property, is limited to the lien on that particular property, and if he recovers that property he is not in equity entitled to make an additional charge against the realty. If, on the other hand, the particular property is taken for the benefit of the realty, and sold with the realty, then the lien on the particular property having been absorbed in the general property, he is entitled, by way of subrogation, to payment from the proceeds of the whole property.

*Penn* v. *Calhoun* and *Morgan's Co.* v. *Texas, etc.*, were claims for money loaned to the railroad company. The lenders were rightly held to be unsecured creditors merely.

In *St. Louis, etc., R. R. Co.* v. *Cleveland, etc., R. R.*, the claim was for rent of a leased line. It is manifest that the operation of a leased line is not necessary to maintain as a going concern the main line of the lessee company.

*Louisville R. R. Co.* v. *Wilson* was a claim for attorney fees. Clearly attorneys' services are not indispensably necessary to enable a railroad to perform its public functions.

## III.

**All Six Months' Claimants are Entitled to the Same Treatment.**

The original order appointing the receiver authorized him to borrow not exceeding $35,000 to pay claims against the company which accrued due within six months prior to his appointment (Record, 24). Subsequently on June 7, 1897, an order was made authorizing the receiver to borrow $200,000 for the same purpose (Record, 30). Of the $200,000 so authorized $35,000 were by the later order of July 7, 1897, specifically authorized to be used to repay the $35,000 previously borrowed under the original order of appointment, and which sum had been used to pay the pay-rolls of the company for April and May, the two months prior to the receivership (Record, 35). The remainder of the $200,000 was by order of July 7 diverted to permanent improvements (Record, 35).

The action thus taken by the court, if not taken by the actual consent of the trustees of the two mortgages, was at least so taken without their objection. They thus tacitly agreed thereto. The action of the court at the instance of the receiver in modifying the original authority to borrow money to pay supply claimants of the class of which Mr. Gregg forms a part, while leaving intact the power to borrow money to pay the pay-rolls of the company for the two months prior to the receivership, has resulted in the payment of the laborers and employes of the company for services rendered to it prior to the receivership from the proceeds of receiver's certificates which have been decreed by the court to be paid from the proceeds of the sale prior to the mortgage bondholders.

The claims of these laborers and employes for their wages for the services rendered to the company prior to the receivership have no superior equity to the claims of those furnishing supplies during the same time necessary

to maintain the railroad from day to day as a going concern. By the court's orders part of a class of creditors, all of whose claims stood upon an equal footing as to the lien of the mortgage bondholders, has been paid out of the *corpus* of the property, thus making their claims prior to the lien of the mortgage bondholders, while the other part of the same class have had their claims postponed and made junior to the same lien of the bondholders.

This should not be done. Equity requires that the supply claimants whose claims have been thus postponed by the court should be put upon an equal footing with the claims of the laborers who have been paid.

As was said by Judge Putnam in *New England R. Co.* v. *Carnegie Steel Co.*, 75 F. R., 54, on page 57:

> "It appears that, pursuant to the decree, many claims of the class of the petitioner's were paid by the receivers. Indeed, so far as the record goes, this is the only one unpaid. This would not be equity if the petitioner should ultimately fail of recovery, as equity demands equal distribution among all of the same class."

Even if the claims of those furnishing supplies to a railroad immediately before a receivership are not, for the reasons heretofore stated, entitled to a lien upon the *corpus* of the property prior to that of the mortgage bondholders, in this case the action of the court in ordering, as an incident to the appointment of a receiver, the claims to be paid, and in paying a part of the claims of a class only equal in lien and equity to those of Gregg and the other supply claimants remaining unpaid, all of which was done at least with the tacit assent of the trustees of the mortgages, now entitles these postponed claimants to be paid from the *corpus* of the property, thus putting all of the same class of creditors upon an equality.

The original orders appointing the receiver, and directing these claims to be paid, and authorizing him to

borrow funds sufficient for that purpose, were made either at the instance of the trustee of the first mortgage, and on its application for a receiver, or on the application of the receiver himself.

As said by the Supreme Court in *Fosdick* v. *Schall*, 99 U. S., 235–253:

"The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors he need grant none; but if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mold his order that, while favoring one, injustice is not done to another. If this can not be accomplished the application should ordinarily be denied."

While this doctrine was abused to such an extent as to call forth a sharp reprimand from this court in *Kneeland* v. *the American Loan Co.*, 136 U. S., 89–97, still it must within proper limits be treated as the equitable rule. If, as in the Miltenberger case, 106 U. S., 286, claims of the character of the one at bar were paid out of the *corpus* against the objection of the first mortgagee, it is not asking too much that the original order of the court made at the instance of the first mortgagee should be carried out. Even had the orders not been originally made directing the payment of the claims at bar, still the court might have subsequently provided for their payment.

*Fosdick* v. *Schall*, 99 U. S., 235–253.
*Carnegie Steel Co.* v. *N. E. R. R. Co.*, 79 Fed., 741.
*Finance Co.* v. *the C. & C. R. Co.*, 62 Fed., 205.

*A fortiorari*, should such an order which has been partly carried out, have been enforced by the court below as to all claimants of the same class.

## IV.

### The Special Equity for $3,200.

The receiver was appointed June 2, 1897.

The stipulation between the parties shows that during the month of May and on the 1st, 2d and 3d days of June, 1897, there were sold and delivered to the C., S. & H. R. R. Co. ties of the value of $4,709.53, payment for which would have been due on the 25th of June, 1897, and that an inventory taken by the receiver on the 10th of June, 1897, showed that of the ties so sold and delivered there were on hand upon said date ties to the amount and value of $3,200, which said receiver thereafter used in the operation and maintenance of said railroad as a going concern (Record, 158).

Upon these facts the appellant, in any view of this case, is entitled to be paid out of the proceeds of the sale prior to the mortgage bondholders the sum of $3,200, being the value of the ties on hand when the receiver made his inventory, which were sold and delivered a few weeks before and on the day preceding and following the appointment of the receiver, which the receiver used and which thus inured to the benefit of the bondholders.

The ground of this contention is that the purchase of said ties by said railroad company at a time when it was, as it knew, hopelessly insolvent and had no reasonable expectation of paying therefor, and after it had defaulted on the interest due upon its bonds was a fraudulent purchase which would have entitled Gregg, had the ties not been in the possession of the court, to have retaken them, and which would have entitled and justified the court to order their re-delivery to him, or in default thereof, payment therefor.

While Mr. Gregg in this case could not, without the permission of the court, have taken the ties from the pos-

session of the court, he, in his intervening petition, called attention to the fact that a large part of the ties had been used by the receiver, after his appointment, in the operation and maintenance of the road. A special equity under the circumstances entirely apart from any question of diversion arose as to these $3,200 worth of ties. A court of equity should reimburse him therefor under the circumstances.

This court has recognized special equities entirely apart from any question of diversion.

*St. L., etc., R. R.* v. *Cleveland, etc., Ry.*, 125 U. S., 658, 673.
*Union Trust Co.* v. *Souther*, 107 U. S., 598.
*Morgan* v. *T. C. R. Co.*, 137 U. S., 171, 197.

V.

The record also presents an important question on the subject of diversion and restoration, and of what constitutes a restoration (See transcript of record, Circuit Court of Appeals, pp. 9–11).

We respectfully submit that in view of the far-reaching importance of the questions decided by the Circuit Court of Appeals, its conflict with courts of equal jurisdiction, and the necessity of this court authoritatively determining the law, the case is one which justifies the award of a writ of *certiorari* to bring the question before this tribunal for adjudication.

HARLAN CLEVELAND,
*Of Counsel for the Petitioner.*

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# Supreme Court of the United States.

No. 141.

WINFIELD S. GREGG, *Petitioner*,

*vs.*

THE METROPOLITAN TRUST COMPANY et al., *Respondents*.

## BRIEF ON BEHALF OF WINFIELD S. GREGG, PETITIONER.

## STATEMENT OF THE CASE.

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Printed by JAMES BARCLAY, 108-118 Canal St., Stroixlge Building, Cincinnati, Ohio.

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## BRIEF ON BEHALF OF WINFIELD S. GREGG, PETITIONER.

### STATEMENT OF THE CASE.

This case comes into this court on writ of certiorari from the United States Circuit Court of Appeals for the Sixth Circuit.

In a suit to foreclose a first mortgage for $2,000,000, and a second mortgage for $7,456,000 on the Columbus, Sandusky & Hocking Railroad, Winfield S. Gregg was an intervening petitioner to the amount of $6,804.49, for ties and other current supplies furnished the railroad for its maintenance and operation from day to day as a going concern (Rec. 34). The claim is described in the record and admitted by the parties to have been one

"For materials and supplies, and was necessarily incurred and grew out of the operation and maintenance of said railroad as a going concern from day to day, and was a necessary operating expense in keeping and using said railroad

and preserving said property in a fit and safe condition as such." (Rec. 102, 104, 145, 148.)

The Columbus, Sandusky & Hocking Railroad Company had defaulted in the interest on its first-mortgage bonds due April 1st, 1896, October 1st, 1896, and April 1st, 1897, but nevertheless had been allowed to continue to operate the road (Rec. 153, 202).

A receiver was appointed in the foreclosure suit on June 2d, 1897, at the instance of The Mercantile Trust Company trustee of the first mortgage. (Rec. 22.)

Most of the supplies referred to had been furnished in the month of May, 1897, and on the 1st, 2d, and 3d days of June, 1897. (Rec. 145.)

When the receiver took his inventory on the 10th of June, 1897, $3,200.00 worth of these supplies, viz: ties, were found to be on hand. (Rec. 146.)

The claim was presented to the receiver as a six months' supply claim under the order appointing the receiver and was allowed as such. (Rec. 23, 24; 146.)

It was also presented to and allowed by the Circuit Court as a six months' supply claim within the terms of the order originally appointing the receiver, but so far as it was sought to have it declared a lien on the corpus of the property and paid out of the proceeds of the sale thereof, it was disallowed; (Rec. 133, 175, 176); also so far as it was sought to have it declared a lien on the corpus of the property to the extent of $3,200.00, by reason of the fact that supplies to that amount had been furnished at a time when the Railroad Company had defaulted in its interest for over a year, knew it was insolvent and had no intention of paying therefor, which supplies had come into the hands of the Receiver and had been used by him for the benefit of the property, it was likewise disallowed. (Rec. 146, 175, 176.)

On appeal to the United States Circuit Court of Appeals

(Gregg vs. Mercantile Trust Co. et al., 109 Fed. 220) the decree of the lower court was reversed upon a question as to whether or not there had been a diversion of current earnings. (Rec. 195.)

The Circuit Court found that there had been a diversion of earnings but also a restoration thereof sufficient to make good the diversion and again dismissed the claim, so far as it was sought to have payment thereof from the corpus of the property, or so far as the special equity was claimed to the amount of $3,200.00. (Rec. 235, 257, 319.)

The Circuit Court of Appeals affirmed this decree and reiterated its prior decision in which it had held:

"That preference could be given to such claims only out of the income of the mortgaged railroad and that mortgages upon the corpus could only be displaced by such creditors when it was shown that there had been a diversion of the income either before or after the receivership by which the mortgagees had profited." (Gregg vs. Mercantile Trust Co. 109 Fed. 220, 227.)

The court said:

"The proceeds of the sale of the mortgaged property is insufficient to pay the mortgage debts, and if the appellant is to be paid at all he must be paid at the expense of the mortgage creditors out of the proceeds of the sale of the mortgaged property.

"Before the mortgage creditors can be displaced in respect of the corpus of the property it must appear that the current earnings which accrued during the period shortly before the receivership were not applied to the payment of current operating expenses, incurred within the same period, but were used in the permanent improvement of the property mortgaged or for the payment of the mortgage debt, and that as a consequence of this misapplication current expense creditors have been disappointed. This is the well settled rule in respect of the payment of these so-called preferential debts of the income. Central Trust Co. vs. East Tenn. V. & G. Ry. Co., 26 C. C. A. 30; International Trust Co. vs. Townsend

Brick Co. 37 C. C. A. 396; Rhode Island Locomotive Works vs. Continental Trust Co., 47 C. C. A. 147.

"This was the law as declared in the opinion upon the former appeal and as such is the law of the case. Gregg vs. Mercantile Trust Co., 109 F. R. 220, 227." (Rec. 348.)

The mortgaged property realized at the sale only sufficient, after paying costs, receivers' certificates, and accrued interest, to pay the first-mortgage bondholders a little more than fifty cents on the dollar (Rec. 330).

## FIRST POINT.

**The diversion of current earnings for the benefit of the first mortgage bondholders was not a condition precedent to the payment of Gregg as a supply claimant out of the proceeds of the sale of the mortgaged property.**

In deciding the contrary the Circuit Court of Appeals for the Sixth Circuit was not only in irreconcilable conflict with its own prior decisions but also with the decisions of the Circuit Courts of Appeal for the First, Fourth, Eighth and Ninth Circuits and the decisions of this court.

(a) It had first formulated the doctrine applicable to such claims in Central Trust Co. vs. East Tennessee, V. & G. R. Co., 80 Fed. 624, where it had said (page 626):

"But, independently of any diversion of current income, there is a class of debts, incurred in maintaining the operation of a railway, which, under special circumstances, and subject to very positive limitations, has been held to outrank, in priority of payment, contract liens."

And after discussing

Miltenberger vs. Railway Co., 106 U. S. 286-311;
Burnham vs. Bowen, 111 U. S. 776-781;
Kneeland vs. Trust Co., 136 U. S. 89-97;
Thomas vs. Car Co., 149 U. S. 94-117,

had summarized the law as follows:

"From these cases it may be deduced that in respect of railroad mortgages there is an implied agreement that all proper operating expenses of such companies, while under control of the mortgagors, are to be paid out of current receipts, and that any diversion of such income by which current operating expenses are left unpaid is a misappropriation of the income, and upon a proper showing the mortgagees receiving the benefit will be required to reimburse the fund applicable to the payment of these 'debts of the income' to the extent of the diversion. It may further be deduced that, independently of any diversion, the necessary operating expenses of a mortgaged railroad, constituting a first charge upon the income while under the control of the mortgagor, will continue to be a charge upon the income under a receivership, and, if necessary, upon the corpus of the property. This latter equity is supposed to arise from the nature of the public duties resting upon such companies, and upon the necessity of such expenditures in preserving the property as a going concern for the ultimate benefit of the mortgage creditors."

This was the law of the Sixth Circuit when Gregg furnished the ties in question in May and June, 1897, at a time when the Railroad Company was insolvent and had defaulted in the payment of interest on its bonds. It is a fair presumption that he relied upon the security of the corpus in furnishing this material. It is inconceivable that he would otherwise have done so.

Despite this decision, which was rendered in 1897, the same court, in 1899, while the case at bar was pending in that court, said, in International Trust Co. vs. Townsend Brick & Contr'g Co., 95 Fed. 850 (page 860):

"The power of the court to displace mortgage liens in favor of such unsecured debts of the mortgagor depends upon the fact that the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgage, and the extent to which the corpus of the mortgaged property can be called upon to pay such debts of the income is limited by the amount of the diversion."

In Rhode Island Locomotive Works vs. Continental Trust Co., 168 Fed. 5, 7, this general rule was again stated.

In both of these cases, however, the claims seeking priority were held not to be "current supply claims" or "debts of the income." The two decisions, at total variance with the prior case, were purely *obiter* in reference to the question whether the claims were payable out of the proceeds of the sale of the mortgaged property. For in International Trust Co. vs. Townsend Brick & Contr'g Co. (*supra*), the bridge, for the payment of which priority was sought, was held to be a permanent betterment; and in Rhode Island Locomotive Works vs. Continental Trust Company (*supra*) the locomotives, for which payment was sought, were found to have been purchased on the general credit of the company, and not in the expectation of being paid for out of current earnings.

But on the first appeal of the case at bar (Gregg vs. Mercantile Trust Co., 109 Fed. 220), while the claim was found to be one for current operating expenses absolutely necessary to enable the railroad to continue as "a going concern," and "in every respect a highly meritorious one," the court followed its *dicta* in the last two cases, contrary to its prior decision in 1897, although it declared (page 229):

"We are aware of the fact that in maintaining the necessity for evidence of diversion of income before allowing solemn mortgage securities to be displaced we are in disagreement with other courts of appeal, for whose judgment we entertain very great respect. Believing, as we do, that we have correctly interpreted the opinions of the Supreme Court, and that the limitations which have been placed upon the preferential character of unsecured operating debts are in accord with settled principles of justice, we shall adhere to the views we entertain until the Supreme Court shall otherwise adjudicate."

(b) The Circuit Courts of Appeals referred to in this statement are as follows:

First Circuit—

In the Circuit Court of Appeals for the First Circuit in the case of New England R. R. Co. vs. Carnegie Steel Co., 75 Fed., 54, Judge Putnam said, pages 58, 59:

"The petition sets out no special circumstances to distinguish the claim from an ordinary current supply bill, or to entitle it to a lien on the corpus of the mortgaged property. It states enough, in connection with what we have already explained, to entitle it to the usual order for payment by the receivers, and consequently by the purchasers referred to. Therefore, as it ranked only as an ordinary current supply bill, could the court give it priority over the mortgage in question on the corpus of that portion of the property as to which the corporation had absolutely parted with all power of disposal except subject to the mortgagee's title? Whatever might be our decision if the case was of novel impression, we think we are concluded by Miltenberger vs. Railway Co., 106 U. S. 286, 292, 293, 295, 298, 302, 304, 308, 311, as explained, and perhaps limited, in Kneeland vs. Trust Co., 136 U. S. 89, 96, 97; Thomas vs. Car Co., 149 U. S. 95, 110, 112; Bound vs. Railway Co., 7 C. C. A., 322, 58 Fed. 473, 480, and Finance Company of Pennsylvania vs. Charleston, C. & C. R. Co., 10 C. C. A. 323, 62 Fed. 205, 208. We are therefore required to hold that the circuit court had the power to give the priority complained of to supply bills of the character, contracted at the time and remaining unpaid, under the circumstances shown in reference to those now at issue. What would have been the conclusion if the trustees of the second mortgage had not asked for a receiver and had not submitted to the order of September 8, 1894, modifying to some extent the then existing receivership, and thus giving it retroactive effect as of the time of its original creation, we need not determine. So far as we have discovered, Miltenberger vs. Railway Co. is the only instance in which the Supreme Court has in fact allowed accrued supply bills a priority against the corpus of mortgaged property; and, as we understand that suit, the circumstances of the case at bar in its final stages are substantially the same for our present purposes, and we have followed strictly its conclusions without going beyond them."

This case affirmed the lower court, which had held in Wood vs. New York & N. E. R. R. Co., 70 Fed. pp. 741, 743—

"that independently of the question of diversion, debts may be preferred which are incurred for labor and supplies necessary to keep the road a going concern from day to day, or which are the outcome of indispensable business relations, a continuance of which involves the interests of the public and the traffic of the road."

Fourth Circuit—

In the Circuit Court of Appeals for the Fourth Circuit, in the cases of Finance Co. vs. Charleston, C. & C. R. Co., 62 Fed. 205—where it affirmatively appeared that the earnings of the railroad company were never sufficient to pay operating expenses—it had been held, speaking through Mr. Justice Fuller:

"It must be regarded as settled that a court of equity may make it a condition of the issue of an order for the appointment of a receiver of a railroad company that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver or from the proceeds of sale; that preferential payments may be directed of unpaid debts for operating expenses, accrued within ninety days, and of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, in view of the interests both of the property and the public, that the property may be preserved and disposed of as a going concern and the company's public duties discharged; and that such indebtedness may be given priority, notwithstanding there may have been no diversion of income, or that the order for payment was not made at the time and as a condition of the receiver's appointment, the necessity and propriety of making it depending upon the facts and circumstances of the particular case and the character of the claims (Miltenberger vs. Railroad Co., 106 U. S. 286, 311; Trust Co. vs. Souther, 107 U. S. 591, 594; Union Trust Co. vs. Illinois M. Ry. Co. 117 U. S. 434; Morgan's L. & T. Railroad & Steamship Co. vs. Texas Cent. Ry.

Co. 137 U. S. 171; Kneeland vs. Foundry Works, 140 U. S. 592). Of course the discretion to enter such orders should be exercised with great care, but as late as Thomas vs. Car Co., 149 U. S. 95, 110, the Supreme Court quoted the remarks upon the doctrine and its proper application in Miltenberger vs. Railroad Co., *supra*, with approval, although, as observed by this court in Bound vs. Railway Co., 58 Fed. 473, 7 C. C. A., 322, the tendency of that case was to narrow the limits within which an equity court should confine itself in making such allowances."

In the case at bar it was a provision of the order appointing the receiver, made at the instance of the trustee of the first mortgage, which is now resisting and so far has successfully resisted this claim, that "claims for wages, services, materials and supplies due and to become due" be paid from the proceeds of receivers' certificates charged on the corpus of the property (Record, 23), and some of them were paid (Record, 27, 32).

Eighth Circuit—

In the Circuit Court of Appeals for the Eighth Circuit, in the case of St. Louis Trust Co. vs. Riley, 70 Fed. 32, the court said (pages 36, 37):

"From this brief review of the decisions of the Supreme Court bearing upon this question, we think these propositions may properly be deduced:

"First. There are certain claims against a mortgaged railroad company, accruing before the appointment of a receiver, which are entitled to preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership and out of the proceeds of the sale of its property.

"Second. It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mortgagor which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee.

"Third. Claims of this character have been given a preference over the mortgage debt by these decisions on one of

two grounds—either on the ground that the mortgage is a lien on the net, and not on the gross, income of the railway company, and where that part of the income that is applicable to the payment of current expenses of operation, proper equipment and necessary improvements has been diverted to pay interest on the mortgage debt or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the earnings of the diverted fund by taking an equal amount from the railway company during the receivership and applying it to the payment of these claims in preference to the mortgage debt (Fosdick vs. Schall, Burnham vs. Bowen, St. Louis, A. & T. H. R. Co. vs. Cleveland, C. C. & I. Ry. Co., Railroad Co. vs. Hamilton, Morgan's L. & T. R. S. S. Co. vs. Texas Cent. Ry. Co., supra); or on the ground that the payment of the claims is necessary to preserve the mortgaged railroad, and to keep it a going concern. It is indispensable that the operation of a railroad be uninterrupted in order that the travel and traffic of the public may be accommodated, and in order that the franchises of the railroad company may be preserved from forfeiture. Hence, the wages of employes, who might otherwise cease from their work; the amounts due to connecting lines of railroad that might otherwise cease their business relations with the managers of the mortgaged property, and the claims for supplies and materials necessary to keep the mortgaged railroad a going concern, may, in proper cases, be paid out of the earnings during the receivership, or out of the proceeds of the sale of the mortgaged property, in preference to the mortgage debt."

And in Central Trust Co. vs. Clark, 81 Fed. 269, the same court said, in reference to this class of cases (page 271):

"It thus appears that within less than thirty days after the gear wheel and pinion had been delivered by the Midvale Steel Company and placed in operation, the railway company mortgaged the property so acquired, along with its other property, and used the proceeds of the mortgage to meet its interest obligations to the first and second mortgage bondholders. In view of these facts, we think, as be-

fore stated, that the intervenor's claim was of such a nature that a court of equity having in charge the administration of the fund realized by the sale of the mortgaged property was fully justified in according it a preference, and in directing its payment before any distribution of the proceeds of the sale was made among the mortgage bondholders. The circumstances under which the indebtedness in controversy was contracted were such as to bring the case fully within the doctrine which was stated by this court, after a full review of all the decisions, in Trust Co. vs. Riley, 36 U. S. App., 100, 16 C. C. A., 610, and 70 Fed. 32 namely, that in a suit brought to foreclose a mortgage lien upon the property of a quasi public corporation, it is competent for a court of equity to award a preference to a claim for property supplied or services rendered to such corporation, when it appears that the property so supplied or the services rendered were necessary to enable the company to discharge its public obligations and remain a going concern, and when it is evident that the property or services in question enhanced the value of the mortgaged property, and thereby inured to the benefit of the mortgagees."

Ninth Circuit—

In the Circuit Court of Appeals for the Ninth Circuit, in the case of New York Guaranty & Indem. Co. vs. Tacoma Ry. & M. Co., 83 Fed., 365, the court said (pages 369, 370):

"The question here is not so much whether the cable involved in this claim for preference is to be regarded in the light of repairs, or for construction, or as an improvement, or in the nature of materials or supplies furnished; but it depends upon the inquiry whether or not it was necessary to keep the road 'a going concern,' within the meaning of this expression as it is used by the Supreme Court in the cases cited above.

"It is further contended that the claim in question is in the nature of a claim for repairs and improvements, and that, to make out a case for preference, there must have been some diversion of income, which otherwise would have been applied, or was properly applicable, towards the payment of the claim, to payment of bonded interest, or otherwise to

the benefit of the security (citing Farmers Loan & Trust Co. vs. Northern Pac. R. Co., 68 Fed., 36, 37). But, to use the language of Judge Caldwell, in Farmers Loan & Trust Co. vs. Kansas City, W. & N. W. R. Co., 53 Fed., 182-189:

"'And it is error to suppose that such debts can only be given priority where there has been a diversion of the income of the road. Nor is it true that they can only be paid out of the earnings of the road, and can not be made a charge on the corpus of the property. A diversion of the income is not essential to give them priority, and they may be made a charge on the corpus of the estate if the earnings are not sufficient to pay them (citing Miltenberger vs. Railway Co., 106 U. S., 286-311, 312; Union Trust Co. vs. Illinois M. Ry. Co., 117 U. S., 434-457; Thomas vs. Railway Co., 36 Fed., 808')".

(c) This court has in two cases distinctly recognized the same principle, namely, that a diversion of earnings is not a condition precedent to the payment of current operating expenses out of the corpus of the property, and that this equity rests mainly upon two grounds: first, the duty which the railroad company owes to the public to keep the road going for the public use and benefit; second, the benefit which the bondholders derive in keeping up the railroad as a going concern, thus enabling it to maintain its property intact and its earning power unimpaired, and preventing a forfeiture of its franchises. To these may be added, that the sudden intervention of the court in taking possession of the railroad property deprives the company of the power of paying these supply claimants either out of its future earnings or by money raised upon its own credit; and also that the trustee of the bondholders in this case allowed the company to continue in possession of its property for more than a year after default in interest, and to incur these obligations, and finally procured the appointment of a receiver upon condition that these claims should be paid by the receiver out of borrowed money secured by a lien on the property.

In Miltenberger vs. Logansport Railway Co., 106 U. S., 286, $10,000.00 due other connecting lines of road for materials and repairs and for ticket and freight balances by the company prior to the receivership were paid out of the corpus of the property. It does not appear from the statement of the case, or from the language of the opinion which was delivered by Mr. Justice Blatchford, that there had been any diversion of earnings either by the company or by the receiver in favor of the bondholders. It does appear that an extension of six miles and a bridge constructed by the receiver under the order of the court were not paid for out of earnings, because their cost was made a charge upon the corpus of the property. There is nothing in the language used by Mr. Justice Blatchford to indicate that the court deemed a diversion of earnings in favor of the bondholders as necessary to make the amount due for materials and repairs and ticket and freight balances a charge upon the corpus of the property; on the contrary, the language of the opinion indicates clearly that the court deemed such a charge proper as based upon the equity arising solely from preserving and maintaining the road as a going concern. Mr. Justice Blatchford said (pp. 311, 312):

"It can not be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. Yet, the discretion to do so should be exercised with very great care. The payment of such debts stands, prima facie, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued

within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of nonpayment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use, as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking through Mr. Justice Woods, in Barton vs. Barbour, 104 U. S. 126. The appellants furnish no basis for questioning any specific amounts allowed in respect of the arrears referred to, but object to the allowance of anything out of the sale of the corpus for such expenditures. Under all the circumstances of the case, we see no valid objection to the provisions of the orders complained of."

This case was cited approvingly in Union Trust Co. vs. Illinois Midland Co., 117 U. S. 434. In that case wages due employes of the railroad within six months immediately preceding the appointment of the receiver were allowed priority out of the corpus of the property. Mr. Justice Blatchford again delivered the opinion of the court. It does not affirmatively appear whether there had been any diversion of earnings by the company in favor of the bondholders, but there is no allusion to that fact as necessary to the granting of a lien upon the corpus of the property, although there is a discussion of the diversion of a portion of the income of the receivership to "betterments" upon the property which

necessitated the issuance of receiver's certificates charged upon the corpus to make good this diversion of earnings as the operating expenses of the receivership were greater in amount than the sum thus diverted, and a portion thereof remained unpaid. (See pp. 462-3.) That there was no final diversion of earnings during the receivership is shown by charging a portion of the receiver's operating expenses upon the corpus, after the diversion for betterments had been provided for (See pp. 464-5.)

From a careful reading of both of these opinions one is irresistibly led to the opinion that the court did not consider a diversion of earnings either by the company or the receiver in favor of the bondholders as necessary to create a lien upon the corpus of the property in favor of claims for labor and supplies absolutely necessary to keep the road a going concern.

Is it true that a party furnishing to a railroad company supplies necessary for ordinary repairs to and the daily operation of the road, looks necessarily to the income as the only means by which he can be paid for these supplies?

If the income of a railroad is notoriously insufficient to pay the expenses absolutely necessary to enable it to fulfill its public functions as a common carrier, can it be said that a party furnishing supplies necessary to maintain it as a going concern looks exclusively to this income for his payment?

If so, it necessarily follows that in such a case no supplies can be furnished at all and that the company can not fulfill its public functions unless either by its own motion, a practice which is certainly not to be commended, or by the adverse action of some creditor, a court of equity is appealed to for the appointment of a receiver.

Take the case of a train thrown off the track by reason of the rails having spread because the ties were rotten. Is the wreck to be left until a receiver is appointed because there

is no means of making payment of the cost of its removal unless the company happens to have the cash in hand and offers to pay the laborers their wages for restoring the road to its prior condition? This is no doubt an extreme case but extreme cases sometimes indicate principles. Can any one doubt that, if the laborers had in fact trusted the company for their payment and had performed the work necessary to remove the wreck and put the rails back in position so that the road might be operated, and the next day a receiver had been appointed, their claims would be held by this court under the authority of the Miltenberger and Illinois Midland cases, valid liens upon the corpus of the property superior to the lien of the mortgagees even if there had been no diversion of earnings by the company? Would not payments of this character from the corpus of the property be, to quote the language of Mr. Justice Blatchford in the Miltenberger case: "Payments in the category of payments to preserve the mortgaged property in a large sense by maintaining the good will and integrity of the enterprise and entitle them to be made a first lien?" The court below evidently thought so for it ordered "wages, traffic balances, materials and supplies" furnished within six months of the receivership and remaining unpaid when the receiver was appointed in the case at bar to be paid by the receiver out of the proceeds of receiver's certificates which were made a charge upon the corpus of the property. (R. pp. 23, 27.)

Some of these claims were paid, but for some reason never explained the order was modified, and others were left unpaid.

If the claims of the laborers may be preferred, may not the claims of those who furnished sound ties to replace the rotten ones also be preferred? In the case supposed, in order to maintain the track in place after the wreck had been

removed sound ties would have been indispensable. Is the claim for an indispensable cross tie supplied to a company any the less entitled to equitable consideration than the claim of the indispensable laborer who puts the indispensable cross tie into its proper place?

They must stand upon an equal footing, and either neither can be given preference or both are equally entitled to priority.

If the doctrine of this court upon the question of priority in favor of current supply claimants over mortgage bondholders had been limited to cases where there had been a diversion of earnings by the company in favor of the bondholders, and that what these latter had inequitably received they must restore, the equity would have been apparent. This is the doctrine of Fosdick vs. Schall, 99 U. S. 235. But this court has not limited itself to the granting of priority in such cases only, but has extended the equity to cases where there has been no diversion of earnings by the company whatever.

It has admittedly extended it to cases where the supply claimants are entitled to be paid from the surplus income of the receivership, and if this has been diverted in favor of the bondholders, then out of the corpus of the property.

It has extended it also to cases where, "while the company is operating its road its income is misappropriated and diverted to purposes which do not inure to the benefit of the mortgage bondholders and are foreign to the beneficial maintenance, preservation and improvement of the property," to quote the language of Mr. Justice White, in V. & A. Coal Co. vs. Central Railroad Co., 170 U. S. 355, 365.

Until the mortgage bondholders take possession of a railroad either directly under the powers conferred upon the

trustee in the mortgage or by the intervention of a court of equity in the appointment of a receiver, the bondholders have no rights in the income of the road although that income has been mortgaged to them. When, however, they do exercise their contractual rights and do take possession of the road, why are they not entitled to the income thereafter accruing to the exclusion of the supply claimants unless the income during the time the road was operated by the company was diverted from the payment of supply claims to the bondholders' benefit? This court has answered this by saying that the bondholders are only entitled to the net income, and that the intervention of the court has deprived the company of its means of paying those expenses which are primarily a charge upon its gross income, and the court must do what the company would have done if let alone.

But, even if this is so, wherein lies the equity of imposing a burden upon the bondholders by depriving them of their contractual rights in the income or in the corpus if that income is diverted by the receiver, in a case where before they had any legal right to interfere the income of the company was diverted by the company without any power of the bondholders to control it to purposes "foreign to the beneficial maintenance, preservation and improvement of the property" so as not to inure to their benefit?

What difference in such a case is there between their rights in the income and their rights in the corpus? The company certainly in the case where there had been no long previous default in the payment of the mortgage interest authorizing the bondholders to intervene and sequestrate the income, was not the agent of the bondholders in thus diverting the earnings. Upon what principle of equity then is it, in such a case, that a supply claimant has a claim upon the earnings of the receivership superior to the mortgages? It is said that a person furnishing supplies to a railroad company which he

knows to be mortgaged can not expect to receive payment out of the corpus of the property other than that which is left after liquidating the mortgage debts and that he contracts with the company with that understanding. But, if the mortgage also covers income, he knows that the income may be secured by the mortgagee in the event that the company fails to pay interest. Why does he not then also contract with the understanding that, if the mortgagee exercises his legal rights, he will also be deprived of payment from the earnings which the company were unable to obtain because of the legal intervention of the bondholders?

We respectfully submit that in such a case the court has exercised its power to prefer one class of creditors over another class of creditors, when the equity of the one given the legal right is of equal rank except upon the theory that the supply claimant has done something for the property by keeping it a going concern, which makes it more valuable to the bondholder and enables the company to fulfill its public duties; and if so, then his rights in the corpus are as great as his rights in the income. Such we understand to be the principle decided in the Miltenberger and Illinois Midland cases.

It must be remembered that we are not treating of strict legal rights. The supply claimant has no such rights either in the corpus or the earnings, while the bondholders have such legal rights both in the corpus and the earnings. We are considering equitable rights—those which appeal to the conscience of a chancellor and which demand that he shall do justice. If there are surplus earnings the court of equity takes these earnings away from the bondholder, who at law is entitled to them, and gives them to the supply claimant, because the court deems the latter equitably entitled to them. If there are no such earnings and the supply claimant has preserved the property and kept it a "going concern" so that it may continue to fulfill its public functions and maintain its

value for the benefit of the bondholders, why may he not be entitled to the same equity of payment from the corpus of the property as he is in the case of earnings from those earnings? In each case legal rights are impaired and in each case there has been the same preservation of the railroad as a going concern for the benefit of the bondholders and the same maintenance of the highway for the public use.

In its last analysis, there is no difference between the equity of the supply claimant in the corpus from his equity in the earnings. Such was the decision of this court in the Miltenberger and Illinois Midland cases, and the language of the opinions in various other cases, where it has been said that this equity will be given "in the corpus of the property." This certainly is the view of the judges of the inferior federal courts, whose opinions we have quoted above, and notably the opinion of Mr. Chief Justice Fuller in Finance Co. vs. Charleston, C. & C. R. R., 62 F. R. 205, on page 208; and of Judge Putnam in New England R. R. Co. vs. Carnegie, 75 F. R. 54 on page 59.

This court has never refused to pay supply claimants out of the corpus, on the ground that there has been no diversion of earnings; and has never formulated any such doctrine; nor have its decisions been construed as formulating any such doctrine except by the Circuit Court of Appeals for the Sixth Circuit. Four other courts of equal jurisdiction have interpreted its decisions as being quite the contrary.

The only cases in this court in which a charge against the corpus of the property has been denied are the following:

Fosdick vs. Schall, 99 U. S., 235.

Huidekoper vs. Locomotive Works, 99 U. S., 258.

Penn vs. Calhoun, 121 U. S., 251.

St. Louis, etc., R. R. vs. Cleveland, etc., R. R., 125 U. S., 658.

Kneeland vs. Amer. Loan Co., 136 U. S., 89.
Morgan's Co. vs. Texas Central Ry., 137 U. S., 171.
Louisville, etc., Railroad Co. vs. Wilson, 138 U. S. 501.
Thomas vs. Western Car Co., 149 U. S. 95.

None of these cases involved claims for supplies furnished or labor rendered to a railroad company necessary to maintain the railroad from day to day as a going concern.

Fosdick vs. Schall, Huidekoper vs. Locomotive Works, Kneeland vs. American Loan Co. and Thomas vs. Western Car Co. were all cases on leasing of rolling stock. The principle upon which all the rolling stock cases are decided is that the conditional vendor, having retained a lien upon particular property, is limited to the lien on that particular property, and if he recovers that property he is not in equity entitled to make an additional charge against the realty. If, on the other hand, the particular property is taken for the benefit of the realty, and sold with the realty, then the lien on the particular property having been absorbed in the general property, he is entitled, by way of subrogation, to payment from the proceeds of the whole property.

Penn vs. Calhoun and Morgan's Co. vs. Texas, etc., were claims for money loaned to the railroad company. The lenders were rightly held to be unsecured creditors merely.

In St. Louis, etc., R. R. Co. vs. Cleveland, etc., R. R., the claim was for rent of a leased line. It is manifest that the operation of a leased line is not necessary to maintain as a going concern the main line of the lessee company.

Louisville R. R. Co. vs. Wilson was a claim for attorney fees. Clearly attorneys' services are not indispensably necessary to enable a railroad to perform its public functions.

## SECOND POINT.

**All the six months' claimants are entitled to the same treatment, especially in this case.**

The original order appointing the receiver was made on June 2, 1897, the same day the bill was filed, at the instance of the Mercantile Trust Company, trustee of the first mortgage bondholders. Presumably the receiver was appointed because the trustee and the company agreed to its conditions and its terms. It authorized the receiver, among other things, "to pay the employees, officials and other persons having claims for wages, services, materials and supplies due and to become due and unpaid growing out of the operation of the railroad of the defendant, including current and unpaid vouchers;" and for that purpose to borrow such sums of money as might be necessary, not exceeding $35,000.00, but to pay no claims against the railway company which had accrued due more than six months prior to the date of the order (Rec. pp. 23-4).

Subsequently on June 7, 1897, the receiver represented to the court; that there were certain obligations and indebtedness which had been incurred by the railroad company in the maintenance and operation of the railroad prior to his appointment, which indebtedness it was necessary to pay in order to further operate and maintain the railroad in the performance of its duty as a common carrier under the law and in the carrying on of its business; that said indebtedness was for labor performed by its employees, for maturing and matured car trusts, for traffic balances, for interest on terminal property, for rental, for taxes, for materials and supplies furnished said railroad company, and for obligations incurred in the maintenance and operation of said railroad during a period of six months next preceding the receivership; that the aggregate of such obligations exceeded $200,000.00 and that it would require said sum in order to pay such obliga-

tions; that it was for the best interests of the bondholders of said railroad and of other persons interested therein that such obligations should be paid as speedily as possible; and that, as he was unable to meet such obligations from the operation of the railroad, he asked the authority of the court to borrow money and issue receivers' certificates in the amount of $200,000.00 for that purpose (Rec. 26).

On the same day, June 7th, 1897, the court made an order authorizing the receiver to borrow $200,000.00 and issue his receivers' certificates therefor for the purpose of paying the obligations referred to and made them a charge upon the earnings of the receivership and the proceeds of the sale of the property (Rec. 27).

A month afterwards, on July 7th, 1897, the receiver, being represented by one of counsel, who had signed the original bill of complaint of the Mercantile Trust Company and no one else except the trustee of the second mortgage being represented, filed a supplemental application in which he asked authority to apply $30,000.00 of the proceeds of $200,000.00 of receivers' certificates to the acquirement of certain real estate; and further represented that he had used $35,000.00 to pay the wages which had accrued prior to the receivership, and asked that he might be authorized to apply the remaining $135,000.00 in paying car trust obligations, accruing pay rolls and necessary repairs. On the same day an order was made to that effect (Rec. 32).

The result of this was that of the $200,000.00 authorized to be borrowed June 2d and June 7th, and for which receivers' certificates were issued, $35,000.00 was used to pay wages which had accrued prior to the receivership and the remaining $165,000 was diverted for permanent improvements. The other six months' claimants were left unpaid.

This anomalous proceeding was at the express instance of the Mercantile Trust Company and its receiver. It had

originally procured the appointment of a receiver, and authority to issue receivers' certificates on an entirely different basis, and by an order in which it had provided for the payment of these claims and the borrowing of money for that purpose charged on the corpus of the property.

The subsequent action of the court at the instance of the receiver and the trust companies in modifying the original authority to borrow money to pay supply claimants of the class of which Mr. Gregg forms a part, while leaving intact the power to borrow money to pay the pay-rolls of the company for the two months prior to the receivership, has resulted in the payment of the laborers and employes of the company for services rendered to it prior to the receivership from the proceeds of receivers' certificates which have been decreed by the court to be paid from the proceeds of the sale prior to the mortgage bondholders.

The claims of these laborers and employes for their wages for the services rendered to the company prior to the receivership have no superior equity to the claims of those furnishing supplies during the same time necessary to maintain the railroad from day to day as a going concern. By modifying the original orders part of a class of creditors, all of whose claims stood upon an equal footing as to the lien of the mortgage bondholders, has been paid out of the corpus of the property, thus making their claims prior to the lien of the mortgage bondholders, while the other part of the same class have had their claims postponed and made junior to the same lien of the bondholders. Why should the Mercantile Trust Company as trustee be allowed to change the terms of the orders under which the receiver was appointed and use the proceeds of receivers' certificates to make permanent improvements after having gotten a receiver appointed upon condition that supply claimants should be paid?

This should not be done. Equity requires that the supply claimants whose claims have been thus postponed by the

court should be put upon an equal footing with the claims of the laborers who have been paid.

As was said by Judge Putman in New England R. Co. vs. Carnegie Steel Co., 75 F. R., 54, on page 57:

"It appears that, pursuant to the decree, many claims of the class of the petitioner's were paid by the receivers. Indeed, so far as the record goes, this is the only one unpaid. This would not be equity if the petitioner should ultimately fail of recovery, as equity demands equal distribution among all of the same class."

Even if the claims of those furnishing supplies to a railroad immediately before a receivership are not entitled to a lien upon the corpus of the property prior to that of the mortgage bondholders, in this case the action of the trustee in waiting over a year after default in interest before applying for a receiver, and then procuring a receiver by an order directing, as an incident to the appointment of a receiver, the claims to be paid, and allowing a part of the claims of a class only equal in lien and equity to those of Gregg and the other supply claimants to be paid thereunder, now entitles these postponed claimants to be paid from the corpus of the property, thus putting all of the same class of creditors upon an equality.

The original orders appointing the receiver, and directing these claims to be paid, and authorizing him to borrow funds sufficient for that purpose, were made either at the instance of the trustee of the first mortgage, and on its application for a receiver, or on the application of the receiver himself.

As said by the Supreme Court in Fosdick vs. Schall, 99 U. S., 235-253:

"The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors he need grant none; but if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the

operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mold his order that, while favoring one, injustice is not done to another. If this can not be accomplished the application should ordinarily be denied."

While this doctrine was abused to such an extent as to call forth a sharp reprimand from this court in Kneeland vs. the American Loan Co., 136 U. S., 89-97, still it must within proper limits be treated as the equitable rule. If, as in the Miltenberger case, 106 U. S. 286, claims of the character of the one at bar were paid out of the corpus against the objection of the first mortgagee, it is not asking too much that the original order of the court made at the instance of the first mortgagee should be carried out. Even had the orders not been originally made directing the payment of the claims at bar, still the court might have subsequently provided for their payment.

Fosdick vs. Schall, 99 U. S., 235-253.

Carnegie Steel Co. vs. N. E. R. R. Co., 79 Fed., 741.

Finance Co. vs. the C. & C. R. Co., 62 Fed., 205.

*A fortiori*, should such an order, which has been partly carried out, have been enforced by the court below as to all claimants of the same class. The trustee of the bondholders should not be allowed to change its attitude and switch the proceeds of receivers' certificates to the permanent improvement of the property.

## THIRD POINT.

**The suggestion that the petitioner Gregg had a claim against another fund, namely, the surplus earnings of the receivership, is without weight.**

(a) In answer to the petition for the writ of certiorari, a suggestion was made by the respondents that the petitioner had a claim against another fund, namely, the surplus earn-

ings of the receivership. The statement was also volunteered that there were such surplus earnings, although it was accompanied with a disclaimer that the record showed any such fact.

If the record shows no such fact, the statement should not have been made. The record shows no such fact. So far as the record speaks at all on the matter, it shows the exact contrary to be the fact.

The order authorizing the issue of the $200,000.00 of receivers' certificates to pay six months' supply and other claims made the amount of these certificates a charge upon any surplus earnings of the receivership first after such payments as might be necessary in the operation of the railroad (Rec. 28).

As all the receivers' certificates were paid out of the proceeds of the sale of the property it is fair to presume that there were no surplus earnings of the receivership. The decrees of the lower court bear this out. The original final decree and order of sale made March 10th, 1900, found that $1,043,251.54 of receivers' certificates had been issued; that they were a valid and subsisting lien upon all the property; and "that in addition to the aforesaid receivers' certificates a large amount of indebtedness has been incurred by the receivers appointed in this cause;" that neither the railroad company nor the receivers had the means to pay this indebtedness; and that it was necessary for the protection of the creditors of the receivers and the holders of their certificates to sell the property (Rec. 161).

The later decree of November 25th, 1901, is to the same effect (Rec. 210).

In the decree of confirmation and distribution the receiver's certificates were ordered to be paid out of the proceeds of the sale prior to the bondholders (Rec. 326).

These decrees were all taken, the railroad sold and the proceeds of the sale distributed without any reference to any

surplus earnings of the receivership and even before the receivers had accounted (Rec. 333).

The supply claimants protected themselves in their claims against the proceeds of sale by having some of these proceeds set aside to meet their claims and by an appeal (Rec. 327-8). Had they not done so the fund to which they looked would have been distributed.

It is true that out of abundant caution they reserved any rights they might have against the receivers' surplus earnings should there ever prove to be any. So far as the record shows there not only were no surplus earnings but in addition to over $1,000,000.00 of receivers' certificates "a large amount of indebtedness" had been incurred by the receivers.

(b) Even had there been surplus earnings of the receivership the fact that the supply claimants had a claim against such a fund would not have precluded them from pursuing their claim, if they have a claim for any of the reasons heretofore given, against some other fund, namely, the proceeds of the sale of the property.

(c) And even were there surplus earnings which were primarily liable for the payment of supply claims and the corpus, if liable for any reason only secondarily liable, if the latter fund pays the claims, those interested in the proceeds of the sale, which have been reserved by the court to meet such supply claims, can be fully protected by reimbursement from such surplus earnings, if called upon to pay such claims.

## FOURTH POINT.

### The Special Equity for $3,200.

The receiver was appointed June 2, 1897.

The stipulation between the parties shows that during the month of May and on the 1st, 2d and 3d days of June, 1897, there were sold and delivered to the C., S. & H. R. R. Co. ties of the value of $4,709.53, payment for which would

have been due on the 25th of June, 1897, and that an inventory taken by the receiver on the 10th of June, 1897, showed that of the ties so sold and delivered there were on hand upon said date ties to the amount and value of $3,200, which said receiver thereafter used in the operation and maintenance of said railroad as a going concern. (Record, 158).

Upon these facts the appellant, in any view of this case, is entitled to be paid out of the proceeds of the sale prior to the mortgage bondholders the sum of $3,200, being the value of the ties on hand when the receiver made his inventory, which were sold and delivered a few weeks before and on the day preceding and following the appointment of the receiver, which the receiver used and which thus inured to the benefit of the bondholders.

The ground of this contention is that the purchase of the ties by the railroad company at a time when it was, as it knew, hopelessly insolvent and had no reasonable expectation of paying therefor, and after it had defaulted on the interest due upon its bonds, was a fraudulent purchase which would have entitled Gregg, had the ties not been in the possession of the court, to have retaken them, and which would have entitled and justified the court to order their re-delivery to him, or in default thereof, payment therefor.

Donaldson Assignee vs. Farwell, 93 U. S., 631.
Wimot vs. Lyon et al., 49 Ohio St., 296.
Talcott vs. Henderson, 31 Ohio St., 162.
Morrow vs. New England Stove Co., 57 Fed., 693.
Davis et al. vs. Stewart, 8 Fed., 803.
Jaffray vs. Brown, 29 Fed., 476.

Another consideration is that Gregg could and doubtless would have asked for the re-delivery of the ties upon this ground, had the orders of June 2 and June 7, 1897, appointing the receiver and authorizing the borrowing of $200,000 not directed the payment of this claim.

In his intervening petition, Gregg called attention to the fact that a large part of the ties had been used by the receiver, after his appointment, in the operation and maintenance of the road, and it is so stipulated between the parties (Rec. 37, 39, 146). A special equity under the circumstances entirely apart from any question of diversion arose as to these $3,200 worth of ties. A court of equity should reimburse him therefor under the circumstances.

This court has recognized special equities entirely apart from any question of diversion.

St. L., etc., R. R. vs. Cleveland, etc., Ry., 125 U. S. 658, 673.

Union Trust Co. vs. Souther, 107 U. S. 598.

Morgan vs. T. C. R. Co., 137 U. S. 171, 197.

**FIFTH POINT.**

**The decree below should be reversed.**

HARLAN CLEVELAND,
Of Counsel for Petitioner.

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Clerk

# Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 482 1141.

WINFIELD S. GREGG,

*Appellant,*

*vs.*

METROPOLITAN TRUST COMPANY ET AL.,

*Appellees.*

## Brief of the Respondents Metropolitan Trust Company of the City of New York, individually and as Trustee, Mercantile Trust Company and F. G. Hallet in answer to the Petition.

HERBERT PARSONS,

*Of Counsel for the Respondents.*

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

# Supreme Court of the United States,

OCTOBER TERM, 1903.

No.

WINFIELD S. GREGG,
Appellant,

vs.

METROPOLITAN TRUST COMPANY ET AL.,
Appellees.

**BRIEF OF THE RESPONDENTS METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, INDIVIDUALLY AND AS TRUSTEE, MERCANTILE TRUST COMPANY, AND F. G. HALLET IN ANSWER TO THE PETITION.**

## Statement of the Case.

To the petitioner's statement of the case there should be added the following:

The petitioner Gregg has not claimed only against the proceeds of the sale. He has made claim also against the surplus earnings of the Receiver, and that claim has not yet been adjudicated, but is still reserved to him (Record, pp. 43, 44, 160, 161, 182, 183,

196, 236, 252, 346 and 347). His claim and reservations in this regard are considered *in extenso* under First Point (*infra*). The Receiver did have surplus earnings sufficient to pay petitioner's claim. This does not appear in the record.

The order appointing the Receiver did not, as alleged by the petitioner on page 13 of his brief, authorize the Receiver to borrow $35,000 to pay such claims as Gregg's. Although that order did authorize him to pay preferential supply claims (Record, p. 25, lines 9, 31–35), the borrowing of the $35,000 was authorized simply to pay obligations accrued and accruing upon equipment trust and payrolls (Record, p. 25, lines 37–44). The order authorizing him to borrow $200,000 on Receiver's certificates omitted the words "materials " and supplies furnished said railroad company," although these words were in the petition and although all the other words used in the petition were repeated in the order (Record, pp. 28, 30). Moreover, both the petition and order were to the effect that the Receiver should only borrow such sums "as he may find necessary" (Record, pp. 29, 31). A month later he, apparently, had found it unnecessary to pay supply claims (Record, pp. 35 & 37).

## FIRST POINT.

**The claim of the petitioner Gregg was not made final in the Circuit Court of Appeals. He has a claim against another fund—namely, the surplus earnings of the receivership. The question presented by him in this proceeding is, accordingly, still an academic one.**

The petitioner Gregg demanded not only that his claim be adjudged a lien upon the property prior to the bonds, but that the Receiver should be directed to pay it (Record, pp. 43, 44). The petitioner obtained a stipulation that the decree to be entered on his intervening petition should be

> " without prejudice to any claim said Gregg may
> " have to be paid as a six months' claimant out of
> " surplus earnings, if any, of the receivership."
> (Record, pp. 160, 161.)

This reservation has been continued to date and Gregg still has the opportunity to have his claim paid out of the surplus earnings of the receivership. The original decree of the Circuit Court of March 10, 1900, reserved it in the expression at the end of the first paragraph of Article XXIV. of that decree

> " without, however, prejudice to such rights as
> " may exist in favor of holders of preferential
> " claims to have any net earnings of the receiver-
> " ship applied to the payment of their claims."
> (Record, pp. 182, 183.)

The reservation was continued in the later decree of the Circuit Court of November 25, 1901, in the same words (Record, p. 236).

Neither the decree of March 10, 1900, nor of November 25, 1901, settled the receiver's accounts, but questions

> " including the discharge of the receiver and the
> " settlement of his accounts "

were reserved for future adjudication (Record, pp. 196, 252).

The reservation was further continued in the decree of confirmation and distribution, entered October 8th, 1902 (Record, pp. 346, 347).

The receiver did have surplus earnings. They do not appear in the record, but their existence is a fact. If those surplus earnings were appropriated to pay the petitioner's claim, they would more than do it.

The law as laid down by this Court is clearly to the effect that the surplus earnings of the receivership shall be appropriated to the payment of such a claim.

Burnham vs. Bowen, 111 U. S., 776.
V. & A. Co. vs. Central Railroad, etc., Co., 170 U. S., 355 at 365.

> " It is immaterial in such case, in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders, either in payment of interest on mortgage bonds or expenditures for permanent improvements upon the property. Nor is the equity of a current supply claimant in subsequent income arising from the operation of a railroad under the direction of the court affected

> by the fact that while the company is operating its road its income is misappropriated and diverted to purposes which do not inure to the benefit of the mortgage bondholders and are foreign to the beneficial maintenance, preservation and improvement of the property. This principle finds support in Miltenberger v. Logansport Railway Company, 106 U. S., 286, 311, 312, the decision in which case was approvingly referred to in Union Trust Company v. Illinois Midland Company, 117 U. S., 434, and in the recent case of Thomas v. Western Car Company, 149 U. S., 95, 110. * * * "

And again at page 369:

> " Whether, however, there was a diversion of income before the receivership, inuring to the benefit of the bondholders, the equity in favor of the coal company for payment out of subsequent income, as we have seen, survived and attached to the property when it was taken possession of by the receiver; and if a surplus of income was created by the operations of the road under the receiver, sufficient to satisfy the claims of the intervenors, the right to demand that the surplus income be applied in satisfaction of the claims in question was undoubted."

The petition, accordingly, should not be entertained for the petitioner has another remedy.

> *In re* Tampa Suburban Railroad Co., 168 U. S., 583, at 588.

## SECOND POINT.

**This Court has decided that in order to have preferential supply claims adjudged a lien upon the corpus it is necessary to prove a diversion of earnings.**

*(a)* Upon what ground this Court decided to deny the petition in the case of Rhode Island Locomotive Works vs. Continentnl Trust Co. (187 U. S., 649), does not appear. But in that case the Circuit Court of Appeals for the Sixth Circuit had said (108 Fed., 5):

> " If the appellant is to obtain any relief, it
> " it must show: * * * second, that there are
> " net or current earnings now applicable to the
> " payment of such debts of income or that there
> " has been a diversion of the current earnings,
> " either before or since the receivership, which the
> " mortgagee should equitably restore."

The petition that was filed in this Court for a writ of *certiorari* to review the case was denied (187 U. S., 649).

*(b)* The petitioner admits that there are only two cases in this court in which he can claim a recognition of his contention, and names Miltenberger vs. Logansport Railway Co. (106 U. S., 286), and Union Trust Co. vs. Illinois Midland Co. (117 U. S., 434). He admits that in the latter case it does not affirmatively appear whether there had been any diversion of earnings by the company in favor of the bondholders (p. 11 of his brief). But he goes on to say: " This Court has never refused " to pay supply claims out of the corpus, on the ground " that there has been no diversion of earnings; and

" has never formulated any such doctrine " (p. 11 of his brief).

A re-reading of the expressions used by this Court will remind the Court that it has formulated such a doctrine, and has repeatedly stated the necessity of proving a diversion of earnings.

This Court said in Fosdick vs. Schall (99 U. S., 235):

> " Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund and put in that which belongs to the mortgage creditors, it certainly is not inequitable for the Court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the Court from the future current receipts before anything derived from that source goes to the mortgagees. * * *
>
> " * * * *The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows, that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion.*" (Italics ours.)

Then come in chronological order the two cases *(supra)* on which the petitioner relies.

The expressions in the cases following the petitioner's cases are most important.

St. Louis & C. R. R. vs. Cleveland & C. Ry., 125 U. S., 673:

> "By the Court: The rule governing in all these cases was stated by Chief-Justice Waite in Burnham vs. Bowen, 111 U. S., 776, 783, as follows: 'That, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all."

Kneeland vs. American Loan Co., 136 U. S., 97:

> "Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. * * * Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this

court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

Southern Railway vs. Carnegie Steel Co., 176 U. S., 284:

BY THE COURT: "But it may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee, when accepting his security, impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income; * * * and that, when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use. * * *"

This Court has, it is respectfully submitted, proceeded on the theory that when the earnings are diverted in favor of the bondholders, the bondholders receive more than they bargained for, and should in equity disgorge or restore the amount that they have unjustly received. Upon what other principle can the

expressions of this Court be sustained? A railroad has the right to mortgage its property, even to the extent of having the mortgage cover after acquired property. If the law is to be that it is unnecessary to show a diversion of earnings, the law in effect is that when a railroad company makes a mortgage and records it, that mortgage is not necessarily a mortgage even upon the real property described in it, no matter with what equity the mortgagee acts. This would be a subversion of the law and we respectfully submit the very contrary of what this Court meant by its expressions in Kneeland vs. American Loan Co. (*supra*).

What a court of equity may exact as a condition of complying with a request of a mortgagee for the appointment of a Receiver is not here in question.

It seems that the Court may grant to the Receiver a certain discretion as to the payments which he can make with the proceeds of the Receiver's certificates, in order to retain the good-will of the public. Apparently in the case at bar, the Receiver, although he at first thought that it might be necessary to pay six months' supply claims with the proceeds of the Receiver's certificates to retain that good-will, later concluded that it was only necessary to pay the labor claims. In effect, the case of Miltensberger vs. Logansport Railway Company (*supra*), relied upon by the petitioner, was such a case. There the controversy was concerning the allowances out of the fund of Receiver's credits for payments made by him pursuant to orders of the Court which were made about the inception of the receivership. The creditors who were paid were paid at the beginning of the receivership because it was necessary to retain their good-will in order to operate the

road. All that the Court in effect there held was that the Receiver had not improperly exercised his discretion.

The only ground upon which the petitioner can seriously claim that this Court will review the decision below is that of a diversity of decisions in the different Circuit Courts of Appeals, and the diversity which he in his brief shows is a diversity of decisions dealing simply with the right of preferential claims to a lien upon the corpus and not with what a court of equity may exact as a condition of appointing a Receiver.

The distinction above pointed out is well illustrated by the opinion of the Circuit Court of Appeals for the Fifth Circuit, in Cutting vs. Tavarez, O. & A. R. Co. (Flor. Cent. & P. R. R. Co., intervenors), 61 Fed. Rep., 150, which case is not cited by the petitioner, but is proof that the Sixth Circuit does not stand alone in its interpretation of this Court's opinions. There the Court said, at page 156:

> "*As the court in appointing the receiver made no provision for the payment of such claims and as there is no evidence in the record tending to show that current earnings either before or after the receiver was appointed were diverted* to paying any unearned interest, or, in fact, any interest upon the bonded debt, we are unable to sanction the order authorizing payment of such claims from the proceeds of the sale of the property. See Fosdick v. Schall, 99 U. S., 235." (Italics ours.)

## THIRD POINT.

The points III., IV. and V., made by the petitioner at pages 13 to 17 of his brief, are not points which show that this is a case which this Court should, upon the principles which it has laid down, take up for review.

The petitioner's claim was not provided for in the order authorizing the borrowing of $35,000, as that money was to be used simply to pay obligations upon equipment trusts and payrolls (Record, p. 25, lines 37–44). The order authorizing the borrowing of $200,000 did not specifically authorize the use of any of that money to pay such a claim as the petitioner's, and it also provided that the Receiver should only use as much as he found *necessary*. He apparently did not find it necessary to pay supply claims (see end of Statement and end of Second Point). If there was ever any merit in the petitioner's Point III., he failed to assert it at the proper time. He has not been injured by the issuance of the Receiver's certificates. Although they were paid out of the proceeds of the *corpus* of the property, there was left from the proceeds of sale money sufficient to pay this claim, if it was entitled to be paid. The expenditures by the Receiver also enabled the Receiver to earn moneys against which the petitioner still retains his claim. Moreover, the laborers' claims were, as appears from the first order authorizing the Receiver's certificates, paid because their being paid was made practically a condition of appointing the Receiver, the money for their payment being authorized in the order appointing the Receiver. Any one who contends that there is no greater equity in a wage-earner's claim that in that

of a supply man, is far from expressing the common point of view, which admits that a discretion can be exercised between the two. As to Point IV., if there is any special equity to the extent of $3,200, it is a special equity against the receivership surplus earnings.

## LAST POINT.

The respondents cannot refrain from pointing out to this Honorable Court the unfairness to them if this case is to be brought up to this Court for review. When the order was made distributing the proceeds of the sale, a large sum of money sufficient to pay this and similar claims was set aside to await the determination of an appeal to be taken by the petitioner, or other like claimants. Such an appeal was taken, and was unsuccessful, and a motion for a rehearing was made and denied, and this proceeding has now been brought. Since the Circuit Court made the order of distribution, the fund of money to pay these claims has been and still is in court. If the petitioner's request is granted the money will continue in court to the prejudice of these respondents and their beneficiaries who are its adjudged distributees, who have already been successful before the Master, before the Circuit Court, and before the Circuit Court of Appeals, and who have only the one fund out of which to have their claims satisfied, while, as shown above, the petitioner has another ample and entirely untried fund out of which he may seek to have his claim satisfied.

HERBERT PARSONS,
Of Counsel for the Respondents.

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# Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 141.

WINFIELD S. GREGG,
*Appellant,*

*vs.*

METROPOLITAN TRUST COMPANY, ET AL.,
*Appellees.*

## Brief on Behalf of Metropolitan Trust Company and F. G. Hallet, et al., Appellees.

HERBERT PARSONS,
*Of Counsel.*

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

# Supreme Court of the United States,

OCTOBER TERM.

No. 141.

WINFIELD S. GREGG,
Petitioner,

vs.

METROPOLITAN TRUST COMPANY ET AL.,
Respondents.

## BRIEF ON BEHALF OF THE METROPOLITAN TRUST COMPANY AND F. G. HALLET ET AL., RESPONDENTS.

There are two funds against which the petitioner can claim. There is the fund against which he here claims, namely, the proceeds of the sale of the property. There is also the fund of the Receiver's earnings (Record, pp. 40, 148, 168, 217). By the decree of sale there was to be an accounting of them (Record, pp. 181, 233). This possibility of claiming against two funds is of importance for the reason that if the petitioner's claim against the Receiver's earnings is good, it does not come out of the respondents in any

way. For by the terms of sale, the purchasers received the balance of earnings (Record, p. 21*l*). It would, therefore, come out of them. Whereas if the petitioner's claim here is good against the proceeds, it comes out of the respondents. There are, therefore, three parties interested, namely, the petitioner, the respondents and the purchasers.

The cases in this court allowing the payment of current supply or labor claims divide themselves into four classes as follows:

*(a)* claims paid out of the earnings of the receivership;

*(b)* claims which the Court in its discretion may direct its Receiver to pay in order to keep the railroad a going concern;

*(c)* labor claims; and

*(d)* claims paid because of a diversion of earnings for the benefit of the bondholders.

Upon this appeal we have nothing to do with class *(a)*. There is nothing before this Court in regard to the earnings of the receivership. Although the decrees and orders intimate that there may have been such earnings, there has as yet been no accounting of the Receiver. It may very well be that the petitioner has a claim against the receiver's earnings.

V. & A. Coal Co. vs. Central Railroad, &c., Co., 170 U. S., 355, 365.

Nor is this a labor claim, class *(c)*.

The petitioner's claim must come, therefore, within either *(b)* or *(d)*.

Parenthetically it should be pointed that out the Sixth Circuit does not stand alone in its interpretation of the opinions of this Court on these points.

Fifth Circuit: In *Cutting vs. Tavarez O. & A. R. Co. (Florida Cent. & P. R. R. Co. interveners)*, 61 Fed. Rep., 150, the Court said, at page 156:

> "*As the court in appointing the receiver made no provision for the payment of such claims and as*

*there is no evidence in the record tending to show that current earnings either before or after the receiver was appointed were diverted* to paying any unearned interest, or, in fact, any interest upon the bonded debt, we are unable to sanction the order authorizing payment of such claims from the proceeds of the sale of the property. See Fosdick vs. Schall, 99 U. S., 235." (Italics ours.)

SEVENTH CIRCUIT: The Circuit Court of Appeals for the Seventh Circuit, in *Niles Tool Works vs. Louisville N. A. & C. Ry. Co.*, 112 Fed. Rep., 561, cited with approval the decision in *International Trust Company vs. Townsend Brick & Contracting Co.*, 95 Fed. Rep., 850, and also cited with approval from that portion of *Fosdick vs. Schall* bearing upon the diversion point, as follows:

"In Fosdick vs. Schall the doctrine is recognized, as fully exemplified in the later cases, that the mortgagee of a railroad company is entitled to the net income only to be applied in payment of interest or principal of the mortgage indebtedness; that there is an implied agreement that the current income shall be first applied to payment of the necessary operating expenses of the road, and an equitable lien thus arises in favor of debts for current expenses, which will be enforced to displace mortgage liens within reasonable limitations; and, as remarked in International Trust Co. v. T. B. Townsend Brick & Contracting Co., 37 C. C. A., 396, 405; 95 Fed., 850, 859, 'the doctrine thus stated is the foundation of the "diversion" or "restoration" doctrine applied in the later cases.' So the rule which was actually applied in Fosdick v. Schall was in conformity with such doctrine, and, while it is true that remarks in the opinion indicate that 'proper equipment and useful improvements' may be chargeable against the gross earnings, the ground for such possible exception is thus stated:

> 'If, for the convenience of the moment, something is taken from what may not improperly be called the "current debt fund", and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees' 99 U. S., 253; 25 L. Ed., 342."

EIGHTH CIRCUIT: The situation in the Eighth Circuit which the petitioner asserts supports him is at least doubtful. The Circuit Court of Appeals for the Eighth Circuit in *Illinois Trust & Savings Bank vs. Doud, et al.*, 105 Fed. Rep., 123, after reviewing the various cases in this Court, said:

> "When a careful examination and analysis of the facts and opinions in all the cases in the supreme court upon the subject of preferential claims in suits to foreclose mortgages of quasi-public corporations is made, and dicta are distinguished from adjudications, the decisions of that court will be found to sustain these propositions: A mortgagee of the property, acquired and to be acquired, and of the income of a quasi-public corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these current expenses before the net income to which he is entitled arises. A court of equity engaged in administering mortgaged railroad property under a receivership

in a foreclosure suit may prefer unpaid claims for current expenses of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property. If such a mortgagor diverts the current income from the payment of current expenses to the payment of interest on the mortgage debt, or to the improvement of the mortgaged property, so that current expenses remain unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But if there has been no diversion there can be no restoration, and the amount of restoration cannot exceed the amount of the diversion."

If there is any lack of distinctness in the opinion in Illinois Trust & Bank vs. Doud *(supra)*, *Kansas Loan & Trust Co. vs. Electric R'way, Lt. & Pr. Co.*, 108 Fed. Rep., 702, shows how it is interpreted in that Circuit. The question of diversion was, to be sure, not in point in Illinois Trust & Bank vs. Doud, for the reason that the claim was one for construction and not for current supplies, but in the Kansas Loan & Trust Co. case the case was one of supplies and the question of diversion was, accordingly, important. Judge PHILLIPS said :

"As the intervener's right to a preferential claim is dependent upon the fact that there has been a diversion of the net earnings of the mortgaged property over and above the necessary expenditures for operation, and that such diversion has inured to the benefit of the mortgagees (Bank vs. Doud [C. C. A.], 105 Fed., 123), the burden of proof rests upon the intervener to establish this fact. * * * It devolves upon the intervener to show what sums were diverted after the creation

> of his claim, and he must show by his evidence into what the diverted sum went, so that the court can determine whether it was an improvement or betterment which inured to the benefit of the mortgagee."

The cases cited by the petitioner in that circuit are earlier cases.

In St. Louis Trust Co. vs. Riley, 70 Fed. Rep., 32, cited by him, the question was whether a claim for damages for personal injuries was the sort of a current claim that would be preferred. The Court decided it was not. Much of the language quoted on the petitioner's brief was unnecessary and *obiter*.

We admit that *Central Trust Co. vs. Clark*, 81 Fed. Rep., 269, the other case cited by the petitioner, supports his side, but we respectfully submit that that was decided on the language, which was wholly *obiter* in Trust Co. vs. Riley *(supra)*, and is in effect overruled by Illinois Trust and Savings Bank vs. Doud *(supra)*.

Judge CALDWELL, who dissented in Illinois Trust and Savings Bank vs. Doud *(supra)*, said in that case, at page 153, that the decision of the majority of the Court was in direct conflict with St. Louis Trust Co. vs. Riley, 70 Fed. Rep., 32.

## FIRST POINT.

**While this Court sometimes may have permitted the payment of a current claim out of the proceeds of sale without proof of diversion, those were exceptional instances. The claim of the petitioners is not such an one. There is no reason why this Court should overrule the discretion of the Court below in omitting to give a preference to this claim.**

1. The petitioner relies upon the two cases of *Miltenberger vs. Logansport Railway Company* (106 U. S., 286), and *Union Trust Co. vs. Illinois Midland Co.* (117 U. S., 434).

In *Miltenberger vs. Logansport Railway Co.* (106 U. S., 286), the question did not arise in the same manner as it does here. To be sure, in that case the Receiver was allowed to pay indebtedness to other connecting lines of road in settlement of ticket and freight accounts and balances, and indebtedness for materials and repairs which had accrued prior to the order. But the question was not whether the holders of those claims had a right to have them paid, but whether the Court below in the exercise of its discretion as chancellor could authorize the Receiver to create liens in favor of such claims. All that this Court in effect held was that the Court below had not improperly exercised its discretion in authorizing the Receiver to pay those claims. This may be supported on the ground mentioned in the heading of this point, that the Court had discretion to direct the payment of such a claim in order to keep the concern going. Perhaps the payment of labor claims, where there is no diversion and there is no statutory authority therefor, is to be supported on this ground.

In *Union Trust Co. vs. Illinois Midland Co.* (117 U.

S., 434), the current six months' claim that was allowed was not a claim for supplies, but was a labor claim. These labor claims were combined in the opinion of the Court with some indebtedness due by the Receivers, and consisted of wages due employees of the Illinois Midland Co. within six months immediately preceding the appointment of the first Receiver. The Court, in its opinion, did not discuss at any length the payment of the six months' claims for wages, but after speaking of the claims on account of the Receivers' indebtedness, added:

> "The claims embraced in these items have been carefully scrutinized and reported on favorably by the commissioner and allowed by the Circuit Court, within and in accordance with the principles above laid down, and we think that all of them, including the six months' labor claims,"

were properly allowed. The case, therefore, so far as the claim of the petitioner in the case at bar is concerned, is authority only for the proposition that the Court will make an exception of labor claims and not require proof of diversion before directing their payment. It establishes labor claims as a separate class (see class *(c), supra).*

2. Much stress is laid by the petitioner upon the point that, inasmuch as the payment of six months' labor claims was made in the case at bar, then equally ought his six months' claims for supplies to receive preferential payment.

Is there any basis for his claim under the receivership order? There is not. The petitioner's claim was not provided for in the order in which the Receiver was appointed and by which the borrowing of $35,000 was also authorized. That order (Record, pp. 22–25) read:

> "That as such receiver he have authority * * * to pay the employees, officials and other persons

having claims for wages, services, materials and supplies due and to become due and unpaid, growing out of the operation of the railroad of the defendant, including current and unpaid vouchers; * * * to pay any and all obligations accrued or accruing upon any equipment trusts made by the defendant Railroad Company; and for such purpose, as well as for the purpose of meeting the obligations of the payrolls, said receiver is hereby authorized in his discretion to borrow such sums of money as may be necessary for such purpose, not exceeding thirty-five thousand dollars. But said receiver will pay no claims against said Railroad Company which have accrued more than six months prior to the date of this order."

The $35,000 of Receiver's certificates authorized in the order appointing the Receiver were, therefore, to be used only to pay obligations upon equipment trusts and pay-rolls.

The Receiver next made application for authority to issue $200,000 of Receiver's certificates. In that he said (Record, p. 26):

"there are certain obligations and indebtedness which, prior to the appointment of such receiver herein, said defendant Railroad Company had incurred in the maintenance and operation of said railroad, and which indebtedness it is necessary to pay in order to further operate and maintain said railroad in the performance of its said duties as a common carrier under the law and in the carrying on of its business.

"That said indebtedness is for labor performed by its employees, for maturing and matured car trusts, for traffic balances, for interest on terminal property, for rentals, for taxes, for materials and supplies furnished said Railroad Company and for obligations necessarily incurred in the maintenance and operation of said railroad during a

> period of six months next preceding the appointment of said receiver herein.
>
> "Your petitioner further states that he is unable at this time to state what is exactly the aggregate of such obligations, but that he believes it will exceed the sum of two hundred thousand dollars, and that in order to pay said obligations *or so much thereof as may be necessary*" (italics are ours) "it will require the sum of two hundred thousand dollars within the period of six months next following the appointment of said receiver herein."

The Court made an order in which it referred to the application of the Receiver as one for authority authorizing him to borrow money

> "for the purpose of paying car trusts, maturing or matured, pay rolls, interest on terminal property, traffic balances, taxes and sundry other obligations created in and about the maintenance and operation of said railroad within six months next preceding and following the appointment of a receiver herein,"

and it authorized him

> "to borrow money for the purpose aforesaid in such amount or amounts, not to exceed two hundred thousand dollars, *as he may find necessary*" (italics ours) (Record, pp. 27, 28).

The claims to which the Receiver referred, therefore, exceeded the amount of money for which he asked. He was unable to pay any of them from receipts (Record, p. 26). He, therefore, did not expect to pay all. In fact, he only asked for money to pay such as it should be *necessary to pay*. He apparently did not find it necessary to pay the supply claims.

If there was any merit in the petitioner's contention in regard to the effect of such an order as that appointing the Receiver or authorizing the issuance of

Receiver's certificates, he has failed to assert it at the proper time. He stood by and permitted the making of an application and the issuance of an order which by plain implication might exclude him. Nor has he been injured by the issuance of the Receiver's certificates. For, although they were paid out of the proceeds of the *corpus* of the property, there was left from the proceeds of the sale money sufficient to pay his claim, if it was entitled to be paid, and the expenditures by the Receiver also enabled the Receiver to earn moneys against which the petitioner may still have a claim. Distinct from the provision in regard to this supply claim was the provision in regard to pay-rolls. The payment of pay-rolls was practically made a condition of the appointment of the Receiver. Immediately upon his appointment he was authorized to borrow money to pay them.

It will be seen that Judge TAFT in his order appointing the Receiver and authorizing the issuance of Receiver's certificates followed strictly the law as laid down by this Court in the *Miltenberger* and *Union Trust Co.* cases, and allowed only for the exception that those cases allow.

## SECOND POINT.

**In order to entitle such a claim as that of the petitioner to payment, the petitioner must prove that current earnings were diverted for the benefit of the mortgage creditors and that there has been no restoration of the diverted fund.**

The facts in this case are that there was a diversion. There was also a restoration. The petitioner does not dispute the restoration. He bases his claim on the

broad principle that no proof of diversion is necessary.

The expressions in the cases following the *Miltenberger* and *Union Trust Company* cases are most important.

*St. Louis & C. R. R. vs. Cleveland & C. Ry.*, 125 U. S., 673:

> "By the Court: The rule governing in all these cases was stated by Chief Justice Waite in Burnham vs. Bowen, 111 U. S., 776, 783, as follows: 'That, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' There has be no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all."

*Kneeland vs. American Loan Co.*, 136 U. S., 97:

> "Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. * * * Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receiver-

ship conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

*Southern Railway vs. Carnegie Steel Co.*, 176 U. S., 284:

"By the Court: But it may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee, when accepting his security, impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of current receipts before he has any claim upon such income; * * * and that, when current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use. * * *"

This Court has, it is respectfully submitted, proceeded on the theory that when the earnings are diverted in favor of the bondholders the bondholders receive more than they bargain for and should in equity disgorge or restore the amount that they have

unjustly received. It is akin to the theory of unjust enrichment in quasi-contracts. What sacredness of a contract lien had these prior lien bonds if petitioner's claim is to be permitted ? These bondholders have received 51 per cent. upon their bonds (Record, pp. 324, 330). Such has been the value of their contract lien. The petitioner seeks to receive payment in full. He has endeavored to curry sympathy for himself on the ground that when he furnished the ties in question, in May and June, 1897, the Circuit Court of Appeals had just decided the case of the *Central Trust Co. vs. East Tennessee V. & G. R. Co.*, 80 Fed., 624, and that it was favorable to his contention. But that had not been decided to be the law when in December, 1896, he made his contract to furnish the ties (Record, p. 119), for the *Central Trust Co.* case was not decided until May 4, 1897.

## THIRD POINT.

### There is no special equity for $3,200.

Granted that the petitioner could have obtained from the Court an order for the redelivery of the ties, which the Receiver used, he did not. Nor did the orders of June 2d and June 7th, appointing the Receiver and authorizing the borrowing of $200,000, direct the payment of his claim. They authorized its payment by the Receiver if the Receiver thought it necessary. Nothing more. It may be that the Court had discretion to direct its payment. If so, the petitioner should have seen to it at the time that it did so. He had five years during which the property continued in the hands of the Receiver, to proceed against him. But he set up the claim which he here does in court after court, and lost in court after court. He cannot complain now.

Of course, he may have a claim against the Receiver on the Receiver's accounting on the ground of the Receiver's use of $3,200 worth of this property. But it is a claim against the Receiver and his earnings, and not against the *corpus* of the property, and is not before this Court.

## LAST POINT.

**The Decree Below Should be Affirmed.**

HERBERT PARSONS,
Of Counsel for Respondents.

# Supreme Court of the United States.

No. 141.—October Term, 1904.

Winfield S. Gregg, Petitioner, vs. The Metropolitan Trust Company et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 6, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a petition against a receiver appointed in proceedings for the foreclosure of two railroad mortgages. The petitioner, in pursuance of a contract made on December 1, 1896, with the Columbus, Sandusky and Hocking Railroad Company, the mortgagor, delivered railroad ties to the value of $4,709.53 in May and on June 1, 2 and 3, 1897. The receiver was appointed on June 1, 1897. After his appointment there was found on hand a part of the above ties, to the value of $3,200, and these ties were used in the maintenance of the railroad as a going concern. The petitioner makes a claim on the body of the fund in the receiver's hands, for these and other necessary supplies furnished within six months, amounting in all to $6,804.49. The claim for the ties, at least, is admitted to have been "a necessary operating expense in keeping and using said railroad and preserving said property in a fit and safe condition as such." The petitioner waives a special claim against the receiver for $863.39 for the ties received June 2 and 3, but does claim a lien for $3,200 on hand and not returned to him after the receiver's appointment, in case his whole claim is not allowed. The Circuit Court of Appeals affirmed a decree of the Circuit Court establishing this claim as a six months' claim, but denying the right to go against the body of the fund, whereupon a certiorari was allowed by this Court. 109 Fed. Rep. 220. 124 Fed. Rep. 721.

The case stands as one in which there has been no diversion of income by which the mortgagees have profited, or otherwise, and the main question is the general one, whether in such a case a claim for necessary supplies furnished within six months before the receiver was appointed, should be charged on the corpus of the fund. There are no special circumstances affecting the claim as a whole, and if it is charged on the corpus it can be only by laying down a general rule that such claims for supplies are entitled to precedence over a lien expressly created by a mortgage recorded before the contracts for supplies were made. An impression that such a

general rule was to be deduced from the decisions of this Court led to an evidently unwilling application of it in *New England R. Co.* v. *Carnegie Steel Co.*, 75 Fed. Rep. 54, 58, and perhaps in other cases. But we are of opinion, for reasons that need no further statement, *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, 97, that the general rule is the other way, and has been recognized as being the other way by this Court.

The case principally relied on for giving priority to the claim for supplies is *Miltenberger* v. *Logansport, Crawfordsville & Southwestern Ry.*, 106 U. S. 286. But while the payment of some pre-existing claims was sanctioned in that case, it was expressly stated that "the payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership." The ground of such allowance as was made was not merely that the supplies were necessary for the preservation of the road, but that the payment was necessary to the business of the road—a very different proposition. In the later cases the wholly exceptional character of the allowance is observed and marked. *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, 97, 98. *Thomas* v. *Western Car Co.*, 149 U. S. 95, 110, 111. *Virginia & Alabama Coal Co.* v. *Central Railroad & Banking Co.*, 170 U. S. 355, 370. In *Union Trust Co.* v. *Illinois Midland Ry.*, 117 U. S. 434, 465, labor claims accruing within six months before the appointment of the receiver were allowed without special discussion, but the principles laid down in the Miltenberger case had been repeated in the judgment of the court, and the allowance was said to be in accordance with them. It would seem from *St. Louis, Alton & Terre Haute R. R.* v. *Cleveland, Columbus & Indianapolis Ry.*, 125 U. S. 658, 673, 674, that in both those cases there was a diversion of earnings. But the payment of the employees of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts.

Cases like *Union Trust Co.* v. *Souther*, 107 U. S. 591, where the order appointing the receiver authorized him to pay debts for labor or supplies furnished within six months out of income, stand on the special theory which has been developed with regard to income, and afford no authority for a charge on the body of the fund. *Fosdick* v. *Schall*, 99 U. S. 235. *Burnham* v. *Bowen*, 111 U. S. 776. *Morgan's Louisiana & Texas Railroad & Steamship Co.* v. *Texas Central Ry.*, 137 U. S. 171. *Virginia & Alabama Coal Co.* v. *Central Railroad & Banking Co.*, 170 U. S. 355. *Southern Ry.* v. *Carnegie Steel Co.*, 176 U. S. 257. It is agreed that the petitioner may have a claim against surplus earnings, if any, in the hands of the receiver, but that question is not before us here.

The order appointing the receiver did not go beyond the distinction which we have mentioned, and gave the petitioner no new or higher right

than he had before. After directing him to do certain things, it gave him authority, but did not direct him, to make various payments. It gave him authority, among other things, "to pay the employes, officials and other persons having claims for wages, services, materials and supplies due and to become due and unpaid growing out of the operation of the railroad of the defendant, including current and unpaid vouchers; to settle accounts incurred in the operation of the railroad of the defendant company; to pay any and all obligations accrued or accruing upon any equipment trust made by the defendant railroad company; and for such purpose, as well as for the purpose of meeting the obligations of the pay rolls," he was authorized, "in his discretion, to borrow such sums of money as may be necessary for such purpose, not exceeding thirty-five thousand dollars. But said receiver will pay no claims against the said railway company which have accrued due more than six months prior to the date of this order." It is questionable whether the purposes for which the $35,000 might be borrowed were other than paying equipment trust debts and pay rolls. But even if any words in the order authorized a charge on the corpus in order to pay claims like that of the petitioner, or a payment of them except from income, certainly there are none requiring it or going beyond giving authority to the receiver, if, for instance, he thought payments of previous debts necessary to the continued operation of the road. A strict construction of the decree is warranted by the previous decision of the same Circuit Court of Appeals in *International Trust Co.* v. *T. B. Townsend Brick & Contracting Co.*, 95 Fed. Rep. 850.

A few days later, on June 7, 1897, the receiver applied for and received leave to issue certificates up to $200,000, "for the purpose of paying car trusts, maturing and matured, pay rolls, interest on terminal property, traffic balances, taxes and sundry other obligations created in and about the maintenance and operation of said railroad within six months next preceding and following the appointment of a receiver herein." By a further decree on July 7, $30,000 of these certificates were applied to payment for land bought by the company, $135,000 to car trust obligations, current pay rolls, necessary repairs and expenses of operating the road, and $35,000 to the pay rolls for the previous April and May. The petitioner suggested that the latter decree was a diversion of funds in which, by the terms of the order authorizing the certificates, he was entitled to share, and that the payment of the $35,000 for the April and May labor entitles him to come in on principles of equality. It is not necessary to answer this contention at length. The original order gave the petitioner no such rights as he asserts. It would have been a stretch of authority for the receiver in his discretion to apply the borrowed money to this debt. At least he was not bound to do so. The petition on which the original order was made stated that the money was wanted to pay certain obliga-

tions, "or so much thereof as may be necessary," embodying the distinction which we have drawn from the cases. We already have intimated that the payment of railroad hands might stand on stronger grounds than the payment for past supplies—and if the payment was wrong it would not be righted by making another, less obviously within the scope of the decree.

We are of opinion, finally, that there is no special equity with regard to the $3,200 worth of ties on hand and used by the receiver after his appointment. It is said that the purchase by the railroad company after it had defaulted, as it had, in the interest of its bonds, was fraudulent, and that the petitioner would have been entitled to take back the ties but for the appointment of the receiver. The answers to this contention again are numerous. It does not appear that the purchase of the ties was fraudulent. *Donaldson* v. *Farwell*, 93 U. S. 631. It does not appear, and is not likely that the company bought with the intention not to pay the price. It does not appear that it concealed its insolvency. The default in the interest of the bonds was a public fact. Again, it is a mere speculation whether the petitioner, if he had had the right, would have demanded back the ties. He did not demand them of the receiver. It is quite as likely that if he had known the whole truth he would have taken his chances. The thing that he is least likely to have known is the form of the appointment of the receiver, and, therefore, it is probably a fiction that that encouraged him to wait. It should not have encouraged him, because, as we have said, it gave him no rights. The fact that the receiver used the ties is of no importance. They already were the property of the road, and it was his business to use them. The material point is not the time when they were used, but the time when they were acquired.

*Decree affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*

# Supreme Court of the United States.

No. 141.—October Term, 1904.

Winfield S. Gregg, Petitioner, vs. The Metropolitan Trust Company et al. } On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 6, 1905.]

Mr. Justice McKenna with whom concur Mr. Justice Harlan and Mr. Justice White, dissenting.

I am unable to concur in the opinion of the court, and the importance of the questions involved justifies an expression of the ground of my dissent.

The controversy arises from a claim, to quote from the Circuit Court of Appeals, "for cross ties essential to the replacement of ties decayed in current operation of the railroad. A large proportion were on hand when the receiver was appointed, and were used by him in the maintenance of the roadway. They were all purchased within six months before the receivership, and under circumstances indicating an expectation that they would be paid for out of current income. The claim is in every respect a highly meritorious one."

This description is supplemented by stipulation of counsel that the claim is for "necessary operating expenses in keeping and using said railroad and preserving said property in a fit and safe condition." The claim is denied, affirming the judgment of the lower court, payment out of the body of the fund in the hands of the receiver; and why? That the decisions of this court may be construed as extending the equity of claims for supplies so far is conceded. It is said: "An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in *New England Railroad Company* v. *Carnegie Steel Company*, (75 Fed. Rep. 54, 58,) and perhaps in other cases."

The concession hardly exhibits the strength of the sanction which the rule has received at circuit, and, apparently, neither willingly or unwillingly, but in the desire only to ascertain what this court has decided and to follow it. I may refer to *Trust Company* v. *Riley*, decided by the Circuit Court of Appeals of the Eighth Circuit, (16 C. C. A. 610;) *Finance Company* v. *Charleston*, in Circuit Court of Appeals of the Fourth Circuit, (10 C. C. A. 323;) *New York Guaranty & Indemnity Company*

v. *Tacoma Railway & M. Company*, in the Circuit Court of Appeals of the Ninth Circuit, (83 Fed. Rep. 365.) See also 36 Fed. Rep. 808; *Farmers' Loan & Trust Company* v. *Kansas &c. Railroad Company*, (53 Fed. Rep. 182;) *Same* v. *N. R. R. Company*, (68 Fed Rep. 36;) *Atlantic Trust Company* v. *Woodbridge Canal & Irrigation Company*, (79 Fed. Rep. 39.) And even the Sixth Circuit, from whence the pending case now comes. (*Central Trust Company* v. *East Tennessee, V. & G. R. Company*, 80 Fed. Rep. 624.)

There is strength in this agreement at circuit, and much that was said could be quoted with advantage, but, as my ultimate reliance must be the decisions of this court, I shall proceed immediately to an examination of them.

*Miltenberger* v. *Logansport &c. Railway*, (106 U. S. 286,) is one of the most important of the cases. Indeed it is the leading case, and is carried into and approved in a number of subsequent cases. The decisions which precede it, including *Fosdick* v. *Schall*, (99 U. S. 235,), I assume, are understood. *Wallace* v. *Loomis*, (97 U. S. 146,) may, however, be noticed. It was a suit to foreclose a mortgage on a railroad, in which suit a receiver was appointed. The receivers were authorized to raise money by loan upon certificates to be issued by them, "to put the road and property in repair, and to complete any uncompleted portions thereof, and to procure rolling stock and to manage and operate the road to the best advantage, so as to prevent the property from further *deteriorating*, and to *save* and *preserve* the same for the benefit and interest of the first mortgage bondholders, and all others having an interest therein." The receivers obeyed the order, and the decree of the court "declared the amount due on the receiver's certificates to be a lien on the property in their hands prior to that of the first mortgage bonds." This court sustained the decree as follows:

"The power of a court of equity to appoint managing receivers of such property as a railroad when taken under its charge as a trust fund for the payment of encumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot at this day be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and if possible, with the consent or acquiescence of the parties interested in the fund."

The principle expressed was applied in the Miltenberger case. The receiver appointed in that case was empowered by the court to purchase four engines, four passenger cars, and one hundred new coal cars; also to adjust certain indebtedness of connecting lines, not exceeding $10,000, and to expend $30,000 to complete five miles of road and build a bridge,

and to enter into the contracts required therefor. With the expenditure, the earnings of the road were charged "as with a first lien prior to all encumbrances upon such road." The legality of this was contested. Speaking of the order this court said: The authority conferred by it "was intended to benefit the *res* in the hands of the court, which was the entire mortgage property as covered by both mortgages, and not merely the equity of redemption of the mortgagor as against the mortgagee." And the power to make it was decided, the court quoting from *Wallace* v. *Loomis* as above, and observing "the principle thus recognized covers most of the objections here urged." The payment of $10,000 due to connecting lines of road for materials and repairs, &c., was also sustained. It thus appears that not only expenditures made after the appointment of the receiver, but debts incurred prior to the appointment, were directed to be paid out of the corpus of the property. Justifying its decision, the court said:

"It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. *Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, prima facie, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances.* It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of the limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely also the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good-will and integrity of the enterprise and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking through Mr. Justice Woods, in *Barton* v. *Barbour*, (104 U. S. 126.) The appellants furnish no basis for questioning any specific amounts allowed in respect to the arrears referred to, but object to the allowance of anything out of the sale of the corpus for such expenditures. Under all the circumstances of this case, we see no valid objection to the provisions of the orders complained of."

The case is not overruled; it is distinguished, and the distinction seems to be based upon the difference between supplies for *preservation* of the road and payments necessary to the *business* of the road. Is not the distinction questionable? Can anything be done for the preservation of a road that is not done for its business? If a distinction can be made, how immediate to the business must the supplies be? Is not a bridge across a stream as indispensable to the "accommodation of travel and traffic" as "unpaid ticket and freight balances?" Or (as in the case at bar) is not "the replacement of ties decayed in current operation" as indispensable as the payment of laborers? It is conceded that labor claims were decreed to be paid in *Union Trust Co.* v. *Illinois Midland Ry.*, (117 U. S. 434.) Then why not the other? What distinction in principle can there be in expenditures for any of the many things which are necessary to keep a railroad a going concern? Let all expenditures be declared subordinate which are subsequent to the mortgage, and it can be understood. But how can a distinction be made in value and preferential payment between equally indispensable things?

It is said, however, that the later cases have observed and marked "the wholly exceptional character of the allowance" made in the Miltenberger case. The *Kneeland case*, (136 U. S. 89;) *Thomas case*, (149 U. S. 95,) and *Virginia & Alabama Coal Co.* v. *Central R. & Banking Co.*, (170 U. S. 355,) are cited. Two deductions may be made. If it is meant that the instances were exceptional, I am not at present concerned with it. If it is meant that the principle was, I cannot assent. Admonition to care in the application of a principle is one thing, its overthrow another; and the principle of the Miltenberger case has never been overthrown. *Virginia & Alabama Coal Co.* v. *Central R. & Banking Co.* explains the other two cases. It involved the payment for coal supplied before the appointment of a receiver. There was surplus income during the receivership, and the point under discussion in the case at bar was not directly presented. But there were some observations made which are of value. They remove diversion of income as an element of decision or confusion. It was declared to be immaterial to the equity invoked for the claim whether there had been diversion of income by the company before the appointment of the receiver or afterwards by the receiver, and it is only necessary to consider whether the equity was confined to surplus earnings. I think that it was not so confined. There were surplus earnings, and the principle which established an equity in them was alone contested and was alone necessary to be decided. The decision was carefully made upon a review and an estimate of prior cases. The admonitions of the Kneeland case and the Thomas case were not overlooked. Regarding them, and in connection with them, the Miltenberger case was quoted from, and not only left undisturbed, but ap-

proved, and from it, as well as from other cases, was deduced the principle which was applied in the judgment. And that principle has its foundation in the public interests. A railroad, from its nature and public responsibilities, must be kept a going concern. This is the supreme necessity, and affords the test of the equity invoked for the claims for supplies. It cannot depend upon diversion of income or upon the existence of income. It cannot be confined to debts contracted during the receivership. It may extend to debts contracted before the appointment of the receiver. But recognizing that there must be some limitation of time, the courts have fixed six months as the period within which preferential claims may accrue. And there is no infringement of the rights of mortgagees. Their interests are served, as those of the public are, by keeping the railroad in operation. The limitations of the rule dependent upon the conditions under which supplies are furnished are expressed in *V. & A. Coal Co.* v. *C. R. & Banking Co.*, *supra*, and in *Carnegie Steel Co.* v. *Southern Ry. Co.*, (176 U. S. 257.)

The claim in controversy is manifestly within the rule. It is, as we have seen, "for cross ties essential to the replacement of ties decayed in current operation." In other words, used in and necessary for the business of the road, and comes even within the limitation which the court implies may be put on the Miltenberger case. There is another consideration which may be urged in addition to or independently of the general rule. Ties of the value of $3,200 were used by the receiver after his appointment. This circumstance is too summarily dismissed from consideration. "The material point is," it is said, "not the time when they were used, but the time when they were acquired." A broad declaration, and seems to make all claims accruing before the receivership non-preferential. This probably is not intended, and not extending the remark so far, is not the time of use important if we regard the substance of things? It must not be overlooked that we are dealing with equitable considerations. What would be said of an expenditure by the receiver for ties to displace decaying ones if those furnished by petitioner had not been at hand? Was it not, at least, competent for a court of equity to have restored the ties upon the application of the petitioner? It is said, however, "It is mere speculation if he would have demanded back the ties." He was not given an opportunity. But suppose "he would have taken his chance?" Of what and upon what assurance? Certainly upon the assurance, in addition to his general equity, that a court of equity would not deliberately use his property through its officer, the receiver, in the interest of the business of the road, whose affairs it was administering, and not find in its powers the means and right to order payment for the property so used.